118-394

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~1760.~~ ~~760~~ 464

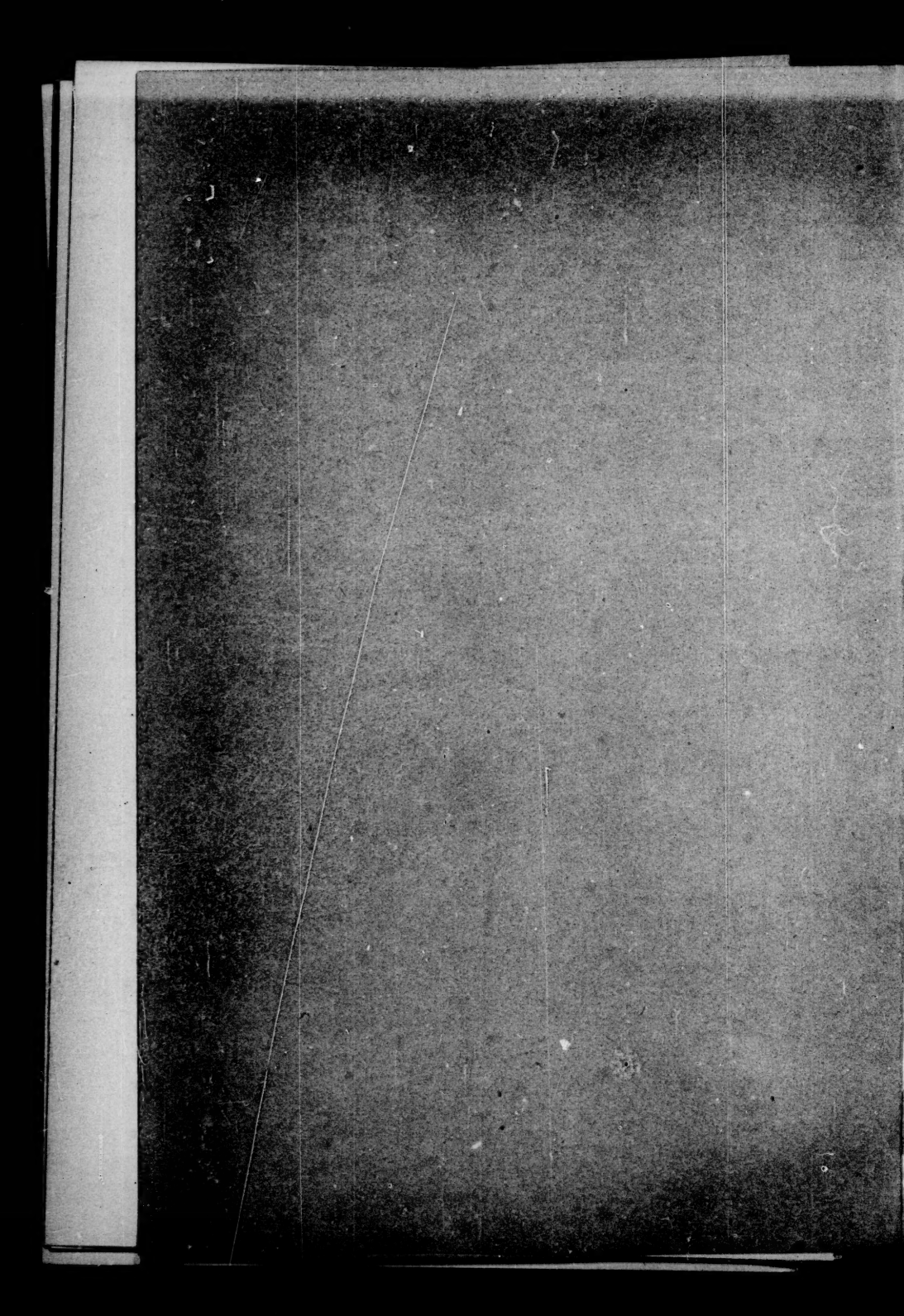
THE COUNTY OF SANTA CLARA,
PLAINTIFF IN ERROR,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED NOVEMBER 5, 1883.



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Santa Clara county is $889,500. That said assessment and levy were made for the fiscal year 1882.

Wherefore said plaintiff prays judgment against said defendant for said several sums, with interest and penalty as aforesaid, and costs of suit, and with ten per cent. on the amount of all said sums as attorney's fees.

JAS. H. CAMPBELL,
Dist. Att'y and Att'y for Pl'ff.

Endorsed: Filed April 13th, 1883. W. H. Owens, clerk. By Thos. Bodley, deputy.

5, 6 *Return of Sheriff on Summons.*

Office of the Sheriff of the city and county of San Francisco.

I hereby certify that I received the annexed summons on the 17th day of April, A. D. 1883, and personally served the same on the 18th day of April, A. D. 1883, upon the Southern Pacific Railroad Company, a corporation, the therein named defendant, by delivering to N. T. Smith, the secretary of said defendant, personally, in the city and county of San Francisco, a copy of said summons attached to a copy of the complaint in said action therein named.

Dated at San Francisco, this 18th day of April, 1883.

PATRICK CONNOLLY, *Sheriff.*
By THOS. J. FARRELL, *Deputy Sheriff.*

7 *Summons.*

STATE OF CALIFORNIA.

THE COUNTY OF SANTA CLARA, Plaintiff, *vs.* THE SOUTHERN PACIFIC RAILROAD CO., Dfendant.	Action brought by the superior court of the county of Santa Clara, State of California, and the complaint filed in said county of Santa Clara, in the office of the clerk of said superior court.

The people of the State of California send greeting to The Southern Pacific Railroad Company, defendant.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the superior court of the county of Santa Clara, State of California, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons—if served within this
8 county, otherwise within thirty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover from you the sum of $8,065.11, due from you to plaintiff as county taxes for the fiscal year, 1882, with 5 per cent penalty added thereto, and interest

thereon at the rate of 2 per cent. per month from Dec. 27, 1882, and 50 cents costs of advertising.

Also for the sum of $5,301.42 due from you to plaintiff as State taxes for the fiscal year, 1882, with 5 per cent. penalty added thereto, and interest thereon at the rate of 2 per cent per month, from Dec. 27, 1882, and 50 cents costs of advertising; and costs of suit, and 10 per cent. on the amount of all said sums as attorney's fee.

Which said cause of action is more fully set forth in the complaint herein, to which you are hereby referred.

9 And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will take judgment against you for said sums, aggregating $13,366.53, with 5 per cent. penalty and interest at the rate of 2 per cent. per month from Dec. 27, 1882, and costs of advertising as aforesaid, and costs and ten per cent. attorney's fees.

Given under my hand and the seal of the superior court of the county of Santa Clara, State of California, this 14th day of April, in the year of our Lord, one thousand eight hundred and eighty-three.

[SEAL.] W. H. OWENS, *Clerk.*
By H. E. WILCOX, *Deputy Clerk.*

Endorsed: Jas. H. Campbell, attorney for plaintiff. Filed April 24, 1883. W. H. Owens, clerk, by H. E. Wilcox, deputy.

10 No. 6780.

In the Superior Court of the County of Santa Clara, State of California.

THE COUNTY OF SANTA CLARA, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, Defendant, } Answer.

Now comes the defendant, and answering the complaint of plaintiff on file herein:

I.

It denies each and every allegation in said complaint had, made, or contained. Denies that it now is, or ever has been, indebted to plaintiff in the sum of $8,065.11, or in any other sum whatever, for county or any taxes for the fiscal year 1882, or any other year. Denies that it is indebted to plaintiff in any sum or sums whatever for per cent., penalty, interest, or costs, by reason of the non-payment of said or any taxes. Denies that it now is, or ever has has been, indebted to plaintiff in the sum of $5,301.42, or in any other sum of money whatever, for State or any taxes for said or any fiscal year, or for per cent., penalty, interest, or costs, in any sum or sums whatever, by reason of the non-payment of said or any taxes.

Denies that said or any taxes were duly or at all assessed or levied upon the real or personal, or any property of defendant, or upon any property in the possession or under its control, or upon any part or portions of the property mentioned in said complaint. Denies that the length or description of the main track, or any portion thereof, is otherwise than as hereinafter specially averred. Denies that the assessed value per mile of said railway was fixed by a *pro rata* distribution per mile of the assessed value of the franchise, roadway, road-bed, rails, or rolling-stock of the railway of defendant at $15,000. Denies that the apportionment of said or any assessment to the county of Santa Clara is, or ever was, $889,500. Denies that any assessment or levy was made on any of said property for the fiscal year 1882 by the State Board of Equalization, or that any apportionment or distribution was made or had by said or any board for said or any year upon said or any property of defendant. Defendant refers to and makes part of this subdivision the matter stated in subdivisions 2 to 39 of this answer.

11 And for further and separate answer defendant avers as follows:

II.

Defendant a Corporation—Its Place of Business—Line of Road—Stockholders.

The defendant is a corporation existing under the laws of the United States and of the State of California (as will hereafter more fully appear). The principal place of business of defendant now is and for many years last past has been in the City of San Francisco, State of California. Some of its stockholders and members now are and ever have been citizens of the United States, resident in said State of California; and some of its stockholders and members now are and ever have been citizens of the United States, resident in States other than the State of California. In the year 1868 it was duly organized under an act of the Legislature of the State of California, approved May 20th, 1861, entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto;" and the term of its existence was fixed at fifty years from the date of its organization; and it is still a corporation duly organized under said law, except in so far as its organization, existence, and character may be affected or modified by the Federal statutes hereinafter referred to.

III.

S. P. R. R.—The Uses and Purposes Thereof.

As such corporation it constructed a line of railroad, and procured the rolling stock, and all appurtenances thereunto belonging, known and designated as the Southern Pacific Railroad (of California), described as follows: Commencing on the waters of the Pacific Ocean in the city and county of San Francisco, and extending

in a southerly direction through portions of the county of San Francisco, and through the county of Santa Clara to Tres Pinos, in the county of San Benito, with a branch therefrom running from Carnadero, in the county of Santa Clara, to Soledad, in the county of Monterey. Said line of railroad also extends from Huron, in Fresno county, to Goshen, in Tulare county, and thence in a southerly direction by way of Tehapechi Pass, Mojave, and Los Angeles, to the Colorado river at Fort Yuma, with three branches from said line at Los Angeles, extending respectively to Santa Monica, Wilmington, and Santa Ana, in the county of Los Angeles. Said line of railroad is connected with the Texas & Pacific Railroad at Sierra Blanca, in the State of Texas, by three railroads, to wit, the Southern Pacific Railroad (of Arizona), extending from Fort Yuma to the eastern boundary line of Arizona, the Southern Pacific Railroad (of New Mexico), extending from said eastern boundary line across New Mexico to the western boundary of Texas, and the Galveston, Harrisburg and San Antonio Railroad, extending from said last named boundary to Sierra Blanca. Said several railroads are operated as one continuous line from a point near Marshall, in Texas, to the Pacific Ocean at San Francisco, for the uses and purposes and in the manner contemplated by the acts of Congress hereinafter referred to.

From Tres Pinos to Huron the said Southern Pacific Railroad has not been completed, but, pending its construction, connection between said points is made over the lines of the Central Pacific Railroad. Defendant has not completed the construction of the road from said Southern Pacific Railroad to the Colorado river, at or near the Needles, to connect with the Atlantic & Pacific Railroad, hereinafter referred to, but has the construction thereof under contract, and will soon have completed a road from Mojave, on the line of said Southern Pacific Railroad, to the said point on the Colorado river, there to connect with said Atlantic & Pacific, and with the said Atlantic & Pacific, when completed, making a continuous line from Springfield, in the State of Missouri, to the Pacific Ocean, as contemplated by the act of Congress, hereinafter referred to, chartering the Atlantic & Pacific Railroad Company.

IV.

Length of Road in the Several Counties.

Of said Southern Pacific Railroad (of California) there had been, prior to the first Monday in March, 1880, completed, and there was in operation in the several counties through which it runs 711.51 miles, to wit: In the city and county of San Francisco 7.36 miles; in the county of San Mateo 25.10 miles; in the county of Santa Clara 59.30 miles; in the county of Santa Cruz 2.15 miles; in the county of San Benito 17.65 miles; in the county of Menterey 12 49.28 miles; in the county of Fresno 17.93 miles; in the county of Tulare 61.98 miles; in the county of Kern 117.83 miles; in the county of Los Angeles 139.48 miles; in the county of

San Bernardino 54.60 miles, and in the county of San Diego 158.85 miles; and all within the State of California.

V.

Act of Congress of July 27th, 1866.—Atlantic and Pacific Act.

On the 27th day of July, 1866, the Government of the United States undertook to construct, or cause to be constructed, a line of railroad from a point at or near the town of Springfield, in the State of Missouri, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as might be found suitable for a railroad route to the Colorado river, at such point as might be selected, and thence by the most practicable and eligible route to the Pacific Ocean; and to that end Congress passed an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," which act was approved on said 27th day of July, 1866, and to said act defendant here refers by title, and makes it part of this answer. (See United States Statutes at Large, vol. 14, page 292.) By said act certain persons therein named were made and erected into a corporation, under the name and style of the "Atlantic & Pacific Railroad Company."

VI.

Intent of Congress in passing Act of 1866.

The intent and purpose of Congress in passing said act was to secure the completion of a railroad from the Missouri river to the Pacific Ocean, with a branch to San Francisco, and to secure the use thereof for all time to come to the Government of the United States for the transportation of its mails, troops, munitions of war, and public stores.

VII.

Like Privileges and Immunities Granted to Defendant.

To facilitate the construction of said road the Government of the United States, by said act of Congress, adopted the defendant as the instrument or agent of the United States, and conferred upon defendant the same powers and clothed defendant with the same privileges and immunities which it conferred upon and clothed the Atlantic & Pacific Railroad Company with, except that the said defendant was to construct only that portion of said railroad between the Colorado river and the city and county of San Francisco.

VIII.

Acceptance of the Conditions.

Said Atlantic & Pacific Railroad Company organized under said act, and obtained *bona fide* subscriptions to the stock of said company to the amount of one million dollars, with ten per centum

paid within two years after the passage and approval of said act of Congress; and said company and defendant immediately after the passage of said act accepted the terms and conditions thereof, and have duly complied therewith.

IX.

Roads Constructed under said Act.

Said Atlantic and Pacific Company has nearly completed, and will within a short time have fully completed, the whole of said road from Springfield to the Colorado river; and defendant has constructed said road as aforesaid to Mojave, with the exception hereinbefore set out, and is prosecuting the construction thereof from said Mojave to a junction with the road of the Atlantic & Pacific Company at Colorado river, and that the whole of said road will be completed and in operation within the present year.

X.

Act of Congress of March 3d, 1871.—Texas Pacific Act.

On the 3d day of March, 1871, the Government of the United States undertook to construct, or cause to be constructed, a line of railroad from Marshall, in the State of Texas, to San Diego, in the State of California, and from said line of road at the Colorado
13 river to construct, or cause to be constructed, a line of railroad which would connect the road from Marshall to San Diego with the line of road provided for in the act of Congress of July 27th, 1866, hereinbefore referred to, and by means of said connecting road to connect the road from Marshall to San Diego with the city of San Francisco; and to that end Congress passed an act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3d, 1870, and subsequently, on the 2d day of May, 1872, passed an act entitled "An act supplementary to an act entitled 'An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,'" approved March 3d, 1871. To said acts defendant here refers by title, and makes it part of this answer. (See vol. 16, U. S. Statutes at Large, 573; vol. 17, *Id.*, 59.)

XI.

Provisions of said Acts Accepted by the Texas Pacific Railroad Company and by Defendant—their work thereunder.

Immediately after the passage of said act of March, 1871, the Texas Pacific Railroad Company was organized in pursuance thereof, and it and defendant accepted all the terms and conditions of each of said acts of 1871 and 1872, and have fully and in every respect complied therewith, and under them and in compliance with the spirit and intent of said acts have completed the roads mentioned in the third subdivision of this complaint.

XII.

Intent of Congress in Passing the Acts of 1871 and 1872.

The purpose of Congress in passing said acts was to insure the transportation of the mails, troops, munitions of war, supplies and stores of the United States, and to that end Congress expressly declared in said acts that no act of said companies, or either of them, nor any law of any State or Territory should ever impede, delay or prevent said companies, or either of them, from performing their obligations to the United States in that regard.

XIII.

The State of California confirms and vests in the Southern Pacific Railroad Company the rights, privileges, franchises, power and authority granted to or vested in said Company by the several Acts of Congress.

On the 4th day of April, 1870, the Legislature of the State of California passed an act entitled "An act to aid in giving effect to an act of Congress relative to the Southern Pacific Railroad Company." By the terms of said act, and to enable said company to comply with the act of Congress of July 27th, 1866, hereinbefore pleaded, and all other acts of Congress then in force, or which might thereafter be enacted, it was provided that the right to construct, maintain, and operate by steam or other power, the said railroad mentioned in said acts of Congress, and all the rights, privileges, franchises, power, and authority conferred upon or granted to or vested in said company by the said acts of Congress, and any acts of Congress which might thereafter be enacted, should be confirmed and vested in the defendant. Said act now is, and ever since said 4th day of April, 1870, has been, in full force and effect. (Statutes 1870, p. 883.)

XIV.

Indebtedness of Defendant Secured by Mortgage.

On the 1st day of April, 1875, the defendant was indebted to divers persons, citizens of the United States, and many of them then and now, citizens and *bona fide* residents of the State of California, in large sums of money advanced to construct and equip the railroad hereinbefore described. To secure the payment of such indebtedness, the defendant, on the said first day of April, 1875, executed and delivered a mortgage upon said Southern Pacific Railroad, its franchises and all rolling stock and appurtenances, and upon a large number of tracts of land, aggregating over eleven million of acres, situated in different counties in the State of California, which said tracts of land then were and ever since have been the property of defendant. Said indebtedness amounts to the sum of forty-six million of dollars, and no part thereof has ever been paid except the accruing interest, and the whole thereof is now and

since the execution of said mortgage has been a valid and
14 subsisting indebtedness against said company, and has been and still is secured by said mortgage, a copy of which, with the endorsements thereon, is hereunto annexed and made a part hereof, marked Exhibit "A."

XV.

Mortgaged Lands—Mode and Manner of Assessment—Payment of Taxes.

The lands mentioned in the preceding subdivision are not, and never have been, in any way connected with the railroad business of the defendant. They are agricultural and grazing lands, held, owned and used for farming and grazing purposes, and are situated as follows in the counties of the State of California, and are distributed in the respective counties in the following quantities: In Santa Clara county, 3,138 acres; San Benito county, 1,879 acres; Monterey county, 1,879 acres; Stanislaus county, 32,242 acres; Merced county, 20,655 acres; Fresno county, 18,789 acres; Tulare county, 260,315 acres; Kern county, 168,096 acres; Los Angeles county, 38,033 acres; San Bernardino county, 30,686 acres; San Diego county, 5,787 acres.

Said lands and all of them for each of the years 1880, 1881 and 1882 were assessed by the assessors of the respective counties in which they are situated at their full cash value, and no deduction from said value was made or allowed on account of said mortgage or the indebtedness secured thereby; on the contrary, the laws of the State of California under which said assessors acted in making said assessments prohibited any deduction from said values on account either of the mortgages or the indebtedness secured thereby.

In each of said years the defendant paid in full, at the time the same became payable, all the taxes levied upon said lands, amounting in the aggregate, for State, county and municipal purposes, to $92,442.49.

The laws of the State of California, then and ever since in force, provide that in the assessment and valuation of lands of like character and situation, and in every respect similar both in quality and use, not owned by railroad or other quasi-public corporations, a mortgage thereon by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, and that in the assessment and valuation of such property for the purposes of taxation, the value of said mortgages shall be deducted therefrom, and the owner of said lands or property only assessed and taxed for the value in excess of the value of the mortgage.

To assist the assessor in the performance of his duties, and to enable him to make the deductions aforesaid, the laws of the State of California make it the duty of the recorder of each county, annually, on or before the first Monday in April, to transmit to the

assessor a complete abstract of all mortgages by which any debt is secured, remaining unsatisfied on the records of his office at 12 o'clock meridian, on the first Monday of March of said year; and it is further provided by said laws that should any such list be found to contain any instrument relating to lands situated in more than one county, it shall be the duty of the assessor to transmit to the State Board of Equalization all information relating thereto, and it shall be the duty of the State Board to attach an apportionment of valuation of such instrument to be assessed in each county, and to transmit to the assessor of each county mentioned as affected in said instrument a statement of valuation of assessment to be levied against said instrument in such county. (Political Code, Sect. 3678.)

In the matter of the valuation of its said lands for the purposes of taxation, the defendant is and ever has been deprived of all the benefits of the said laws which provide for the deduction of indebtedness secured by mortgage from the valuation of lands by reason of the provisions of section 4 of article XIII of the constitution of the State of California, and the action of assessors in pursuance thereof; while all natural persons and all corporations, not quasi public, within the State of California, are entitled to receive, and do receive, the full benefit of said laws, and the deductions required to be made thereunder.

XVI.

Assessment by State Board of Equalization.

On the 27th day of April, 1882, the State Board of Equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section 10 of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails and rolling stock of said railroad against defendant. Said pretended assessment was made separately upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad, and was then and there so entered upon the minutes of said board. Said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based; and no other assessment than the aforesaid was ever made of said property, or any part thereof, for said fiscal year.

XVII.

Failure of State Board to Transmit Assessment.

The State Board of Equalization never did at any time transmit said pretended assessment or any assessment of said property, or any part thereof, to the assessor, or to any of the authorities of said county, and never at any time caused the same to be entered upon the assessment roll of said county for said fiscal year, or for any other year,

nor has said pretended assessment, or said part thereof, or any assessment against said defendant or said property, or any part thereof, ever been entered upon or made part of any assessment roll, book, or delinquent list, in or for said county.

XVIII.

State Board never Apportioned Assessment.

Defendant avers, upon its information and belief, that neither said pretended assessment nor any assessment against defendant in respect to said property, or any part thereof, was ever entered upon any assessment roll or book of said county, or upon any delinqent list of said county, nor was any entry relative to the action of the said State Board of Equalization in respect to the assessment or apportionment of said property or any part thereof, ever entered upon said assessment roll or book, except a letter from the State Board of Equalization, addressed to the assessor of said county, which letter did not contain said assessment or any part thereof, nor a copy of said assessment, or any part thereof, nor did it contain any apportionment thereof, as provided for in section 10 of article XIII of the constitution of the State of California, hereinbefore referred to or otherwise.

XIX.

No Assessment was ever Made or Entered on the Assessment Roll.

Defendant, upon information and belief, avers, that neither said pretended assessment, nor any assessment against this defendant, or any other person or persons, in respect to the said property, or any part thereof, was ever entered upon any assessment roll or book of said county, nor upon any delinquent list of said county; nor was any entry relative to the action of the said State Board of Equalization in respect to the assessment or apportionment of said property of defendant, or any part thereof, ever entered upon said assessment roll or book, except the said letter of the said State Board of Equalization. Said letter was copied by the assessor of said county, on or about the 1st day of June, 1882, upon the assessment. Upon said assessment roll opposite said letter is entered in figures, $889,-500.00, and opposite said figures, under the head of taxes due, is entered in figures, $13,366.53. The same entries, and no others, appear upon the delinquent list of said county for said fiscal year. As defendant is informed and believes, and upon such information and belief, charges the truth and fact to be there are in respect to the said property, and in respect to defendant, no other or further entries upon any assessment roll, book, or delinquent list of said county.

XX.

State Board Pretended to Assess the Whole of said Property to Defendant.

The State Board of Equalization, in making the said pretended

assessment, pretended to assess to and against defendant, the full cash value of said railroad, roadway, road-bed, rails, rolling-stock, and franchises, without deducting therefrom the value of the mortgage, or any part thereof, given and existing thereunder as aforesaid to secure the indebtedness of said company to the holders of said bonds, notwithstanding, as defendant avers, they had full knowledge of the existence of such mortgage.

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XXI.

State Board did not treat said Mortgage as an Interest in the Property.

In making said pretended assessment, the said State Board of Equalization did not deem or treat said mortgage as an interest in said property, but did assess the whole value of said property to the defendant in the same manner it would have done had there been no mortgage thereon.

XXII.

[Stricken out by order of the court, July 19, 1883. L. S. B. S.]

XXIII.

Authority Exercised by State Board Violates Provisions of Fourteenth Amendment.

Under the constitution of the State of California, the board of supervisors of the several counties of the State constitute Boards of Equalization for their respective counties, whose duty it is to equalize the valuation of the taxable property in the county, except the franchise, roadway, road-bed, rails, and rolling stock of railroads operated in more than one county of the State; and to such boards the owners of all property, except as above stated, have the right and privilege to apply for the correction of their assessments, and have the right and privilege of a hearing before the said local Boards of Equalization. By the provisions of the constitution of California, and the laws in pursuance thereof, this right and privilege, or any right or privilege, to be heard in relation to assessments is denied to defendant in respect to the property in question. All of which defendant avers is contrary to the provision of the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

XXIV.

Further Violation of the Fourteenth Amendment.

The power conferred upon the State Board of Equalization by section ten of article XIII of the constitution of California, violates the provision of the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law;

for that said section, as to such power, is self-executing and complete, and does not provide for personal or other notice to be given to the parties to be affected by the exercise of such power; and does not provide for a full or any opportunity of time, place, or tribunal for such parties to be heard in defense of their rights; and hence, under and by said provision of the constitution of the State of California, the liability of owners of such property to taxation, and the amount thereof, may be fixed without notice to them or an opportunity to be heard.

XXV.

Further Discrimination.

The provisions of section four of the constitution of the State of California providing for the assessment of the property of railroad and other quasi-public corporations, is in contravention of the provisons of said Fourteenth Amendment of the Constitution of the United States, in that it discriminates against such corporations; in this, that whereas, under said section four of said article XIII of the constitution of the State of California, if the property of natural persons or corporations, not quasi-public, has a mortgage, lien, or incumbrance thereon, they are not liable to assessment or taxation upon such property, but only upon the value of their interest in such property over and above the value of such mortgage, lien or incumbrance; whereas, in the case of the property of railroad and other quasi-public corporations, no such allowance or deduction is made, had, or allowed with respect to any mort-
17 gage, lien, or incumbrance there may be upon such property; and also in this, that while the tenth section of article XIII of the constitution of the State of California provides the same mode for the assessment of the franchises, roadway, road-bed, rails and rolling stock of all railroads operated in more than one county, whether such property be owned by railroad or other quasi-public corporations, or by private corporations, or by natural persons, yet section four of article XIII of said constitution permits or allows indebtedness secured by mortgage, trust deed or otherwise to be deducted from the value of such property only when it is owned by natural persons or corporations not quasi-public, and denies such deduction when the property is owned by railroad or other quasi-public corporations.

XXVI.

Section 10 of article XIII of said constitution of California provides that all property except the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in the State shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law.

The laws of said State prescribe that all property, except that

above mentioned, shall be assessed in the county in which it is situated by an assessor elected by the people of such county.

[Stricken out by order of the court, July 19, 1883. L. S. B. S.]

Said assessors for each of said years have assessed to the owners and holders thereof in their respective counties the indebtedness of the defendant secured by the mortgage herein mentioned, but never have, nor does the law permit them so to do, made any deduction from the assessment of any of the property of this defendant, on account of the assessments made, as aforesaid, to the holders of such indebtedness.

XXVII.

Further Discrimination.

All owners of railroad property, operated in more than one county, by virtue of said section 10 of article XIII, are denied any protection from the laws of the State of California, which—

(*a.*) Require that property shall be taxed in proportion to its value.

(*b.*) Require such proportions to be ascertained by a general law.

(*c.*) Require that before liability be fixed, an opportunity to be heard must be given.

(*d.*) Give an appeal from the assessor to boards of equalization.

(*e.*) Require the assessment to be made in the county, and prohibit its being made in localities distant from the *situs* of the property.

(*f.*) Which prescribe mode and manner of the assessment.

And defendant avers that at and before and ever since the adoption of the constitution of California, now in force, there were and are existing, under the laws of said State, corporations of various kinds, formed for the purpose of and actually operating and doing business, and holding and using and operating property in more than one county in said State, and that at all of said times there were and there now are divers natural persons, residents of said State, operating property in more than one county in said State, and that at all of said times there were and now are railroads owned by corporations formed under the general laws of said State, and also by natural persons, which are only operated in one county. That by the provisions of section 10 of article XIII of said State constitution, persons operating railroads in more than one county in the State have been singled out from all other persons operating property in more than one county, and denied the right, common to all other persons, to appeal for relief from over-valuations of their property by assessors to the local Board of Equalization, and denied the rights and privileges accorded by the laws to all other persons in that respect.

Corporations in said State of California now are and ever
18 have been formed under general laws relating thereto, and railroad and all other corporations, except public corporations formed or organized for the government of a portion of the State, now are and ever have been designated by the laws of Cali-

fornia as private corporations. Under the provisions of the laws relating to the formation of private corporations such corporations may be formed for any purpose for which individuals or natural persons may lawfully associate themselves together; and there now exist in California, and ever have existed, corporations formed under said laws for fire, marine, mutual life, health, and accident insurance; building, constructing, and operating railroads, wagon roads, telegraphs, bridges, ferries, wharves, chutes, and piers, and for constructing and operating canals, for the purpose of acquiring lands in large tracts, and distributing them as homesteads among the corporators, for savings and loans, for mining, for the sale and distribution of water in cities and towns, for manufacturing, mechanical, and agricultural purposes; for benevolent, charitable, and educational purposes; for cemeteries, agricultural fairs, and various other purposes.

In said State of California there now are and for more than three years last past have been various railroads owned, operated, and controlled either by individuals, partnerships, or by private corporations other than railroad corporations; to wit, by mining and manufacturing corporations. There now is and for more than three years last past has been a railroad in use and operation extending from the city of Marysville in the county of Yuba to the town of Oroville in the county of Butte in said State, a distance of twenty-seven miles, which said road now is and ever has been operated in more than one county in this State, and is of the same gauge as the road of this defendant, and has ever been operated for like uses and purposes.

Said road with all its equipments now is and for more than three years last past has been in the ownership and under the operation and control of one N. D. Rideout, a citizen of the United States and resident of the State of California.

There now is and for more than three years last past has been a railroad extending from the town of Santa Cruz on the Pacific Ocean, and in the county of Santa Cruz eastward through said county and into the county of Monterey to the town of Pajaro a distance of about twenty-one miles. Said road now is and for a long time past has been owned, operated, and used for like purposes for which the defendant's road is owned, operated, and used, and that the same now is and for a long time past has been in the ownership and operated by the Pacific Improvement Company, a private corporation formed under the laws of the State of California, which said corporation is not and never has been a railroad or quasi-public corporation.

There now are and for more than five years last past have been divers other railroads owned and operated in said State by corporations other than railroad corporations, and by individuals and partnerships, and that all of said corporations, individuals, and partnerships are the owners of lands which are assessed by the local assessors of the various counties in which such lands are situated, and all are entitled under the laws of said State to the deductions

provided for in said laws, and, as said defendant, upon information and belief, avers, have been allowed such deductions.

XXVIII.

System Adopted by said Board Violates Rules of Equality.

The State Board of Equalization in making said pretended assessment of the said roadway of defendant did willfully and designedly include in the valuation of said roadway the value of fences erected upon the land of coterminous proprietors; and did willfully and designedly value the said roadway at a greater value than the value of other property similarly situated, and greater than its actual value, upon the ground that such increased valuation should be made because the title of defendant thereto was acquired by condemnation.

The value of such fences which were not the property of defendant nor the property of the owners of said roadway, and the increased value affixed to the roadway by the system adopted by the board, are blended in said pretended assessment, and there is no mode or means by which such illegal valuation can be separated from those which may be legal.

19 [Stricken out by order of the Court, July 19, 1883.—L. S. B. S.]

XXIX.

Defendant's Franchise a Federal one.

And defendant, upon its information and belief, avers, that under and by virtue of the said several acts of Congress, defendant became, and ever since has been, a Federal corporation, and has held its franchise and exercised all its corporate powers under the Government of the United States.

XXX.

Corporate Powers in part derived from Acts of Congress.

And defendant, upon its information and belief, avers, that if by virtue of the several acts of Congress herein referred to it did not become a Federal corporation, yet it holds under the Government of the United States all the corporate powers and franchises granted to it by the said several acts of Congress as the trustee of the said Government, and for the governmental uses and purposes specified in said acts.

XXXI.

That the Franchise of Defendant is not subject to State Taxation.

Under and by virtue of the said several acts of Congress hereinbefore referred to, the defendant was by the Government of the United States selected as the means and instrument of that Government to construct the railroad hereinbefore described, and to keep and maintain the same in repair, to the end that the said Gov-

ernment might, when occasion required, use the same for the transportation of its armies and military stores, and for such other purposes as said Government might, in the execution of its powers, desire to use the same. The Government of the United States has never given to the State of California the right to lay any tax upon the franchise, existence, or operations of defendant. Such a tax would hinder and impede the lawful operations of the Government of the United States; would hinder, delay, and prevent the defendant from performing, as aforesaid, its obligations to the United States, and would nullify and prevent the enforcement of the said several acts of Congress.

20 XXXII.

Whole Franchise Assessed.

Said pretended assessment made by the State Board of Equalization is upon all of the franchises of defendant, and the said board, in valuing the same, included the value of all the franchises and corporate powers held and exercised by defendant under said acts of Congress.

XXXIII.

Tax upon the Franchise Blended with Tax upon Other Property.

The State Board of Equalization, in making said pretended assessment, included and assessed the franchise of defendant, and in making said pretended apportionment included in the valuation affixed to the property of defendant the value thereof, but such value is not separately stated in said apportionment, nor upon any assessment roll or delinquent list of said county, but such value is in said pretended apportionment and upon the assessment roll and delinquent list of said county, blended with the values affixed to the roadway, road-bed, etc., and cannot on either be distinguished or separated from such other values, and the tax upon said franchise is in like manner blended with and cannot be separated from the tax on said roadway, road-bed, etc.

[Stricken out by order of the court, July 19, 1883.—L. S. B. S.]

XXXVIII.

Plaintiff's Causes of Action Based upon Assessment by State Board of Equalization.

On the 27th day of April, 1882, the State Board of Equalization of the State of California, pretending to act under and by
21 virtue of the powers conferred upon it by section ten of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing, upon the franchise, roadway, road-bed, rails and rolling stock of the railroad hereinbefore described and known as the Southern Pacific Railroad, against this defendant; that said pretended assessment was made separately

upon the franchise, roadway, road-bed, rails and rolling stock of said railroad, and was then and there so entered upon the minutes of said board. Said pretended assessment is the assessment upon which the several taxes mentioned in plaintiff's complaint are claimed to be due, and that no other assessment than such pretended assessment was ever made against or upon said property or any part thereof.

[Stricken out by order of the court, July 19, 1883.—L. S. B. S.]

Wherefore defendant prays it be hence dismissed with costs.

J. B. LAMAR,
Attorney for Defendant.

S. W. SANDERSON AND
CREED HAYMOND,
Of Counsel.

22 *Verification.*

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

J. L. Willcutt, being duly sworn, on oath says that he is an officer, to wit, the secretary of the corporation, defendant herein; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his own information or belief, and as to those he believes it to be true.

J. L. WILLCUTT.

Subscribed and sworn to before me, this 15th day of May, A. D. 1883.

CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

23 "EXHIBIT A."

This indenture, made and entered into this first day of April, A. D. 1875, by and between the Southern Pacific Railroad Company, a railroad corporation, duly incorporated and organized under and in pursuance of the laws of the State of California, party of the first part, and D. O. Mills and Lloyd Tevis, of the city and county of San Francisco, California, parties of the second part, witnesseth, that—

Whereas, the said party of the first part desires to complete the construction and equipment of its railroad and telegraph lines in the State of California, running from the city of San Francisco in a southerly and southeasterly direction by way of Carnadero Junction, Salinas Valley, and Polonio Pass to the Colorado river, at or near the "Needles;" also from Carnadero Junction to San Benito; also from Los Gatos creek, via Goshen, to the junction with the

first-mentioned line between Poso creek and Kern river; also from the junction near Tehachapi Pass, via Los Angeles, to the Texas Pacific railroad near Fort Yuma; and also from Los Angeles to Wilmington, on San Pedro bay, aggregating eleven hundred and fifty miles of railroad and telegraph line, and to cancel its present bonded indebtedness for construction, secured by a mortgage heretofore made and bearing date November first, eighteen hundred and seventy, and to that end intends and is about to issue its first-mortgage bonds upon said railroad and telegraph line, and its rolling-stock, fixtures, and franchises, and also upon the lands granted to it by Congress, by the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July twenty-seventh, eighteen hundred and sixty-six, and the act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes" approved March third, eighteen hundred and seventy-one, not sold or otherwise disposed of prior to the execution of this mortgage, aggregating, as near as can be estimated, eleven millions of acres; and

Whereas, heretofore, to wit, on the nineteenth day of December, A. D. eighteen hundred and seventy-four, the board of directors of said company, pursuant to the statute of the State of California in such case made and provided, at a meeting of said board at which all the members thereof were present, did, by a resolution to that effect, which was unanimously adopted and passed, determine and direct that first-mortgage bonds upon said railroad and telegraph line, its rolling-stock, fixtures, and franchises, and upon said hereinbefore described lands, to the number of forty-eight thousand, (forty-four thousand of which shall be for one thousand dollars each, and four thousand of which shall be for the sum of five hundred dollars each,) in seven series, to be designated by the letters of the alphabet, commencing with the letter "A," and followed by the succeeding letters in regular order to the letter "G," both inclusive, be prepared, executed, and issued by the president and secretary of said company. Series "A" to consist of thirteen thousand bonds for one thousand dollars each, numbered from one to thirteen thousand, both inclusive, and four thousand bonds for five hundred dollars each, numbered from thirteen thousand and one to seventeen thousand, both inclusive. Series "B" to "F," both inclusive, consisting each of five thousand bonds, for one thousand dollars each, numbered from seventeen thousand and one to forty-two thousand, both inclusive, and Series "G," consisting of six thousand bonds, for one thousand dollars each, numbered from forty-two thousand and one to forty-eight thousand, both inclusive. All of said bonds being payable thirty years after date, with interest at the rate of six per centum per annum, payable semi-annually. The said Series "A" to bear date April first, eighteen hundred and seventy-five, and the said several succeeding series to bear such

dates respectively as the board of directors of said company may direct; all of said bonds aggregating the sum of forty-six millions of dollars; and

Whereas, the said board of directors, at the meeting aforesaid, and in the manner and form, and by the vote aforesaid, did further resolve that the said Series "A" of said bonds should be executed and issued in substantially the following form, and that the succeeding series of said bonds should be in a similar form, with the necessary changes to conform to said resolutions or orders, which form is as follows, to wit:

THE UNITED STATES OF AMERICA.

$1,000 in United States Gold coin. [Vignette.] In United States Gold coin. $1,000

First Mortgage Bond.

No. —— Series "A."

The Southern Pacific Railroad Company (of California.)

For value received, promises to pay one thousand dollars to Mark Hopkins, or bearer, in the city of New York, thirty years from the date hereof, with interest thereon, at the rate of six per centum per annum, from said date, payable semi-annually on the first day of October next ensuing, and on the first day of April and October in each year thereafter, in the city of New York, on presentation and surrender of the respective coupons hereunto annexed, both principal and interest payable in United States gold coin at par, dollar for dollar.

24 This bond is one of series "A" of the first mortgage bonds issued and to be issued by the said Southern Pacific Railroad Company in seven series, designated respectively by the letters of the alphabet, commencing with "A" and ending with "G," both inclusive. Series "A," consisting of thirteen thousand bonds for one thousand dollars each, numbered from one to thirteen thousand, both inclusive, and four thousand bonds for five hundred dollars each, numbered from thirteen thousand and one to seventeen thousand, both inclusive. Series "B" to "F," both inclusive, consisting each of five thousand bonds for one thousand dollars each, numbered from seventeen thousand and one to forty-two thousand, both inclusive, and series "G," consisting of six thousand bonds for one thousand dollars each, numbered from forty-two thousand and one to forty-eight thousand, both inclusive; all of said bonds being payable thirty years after their respective date, with the interest at the rate of six per centum per annum, payable semi-annually.

The said series "A" to bear date April first, eighteen hundred and seventy-five, and the said several succeeding series to bear such dates respectively as the board of directors of said company may direct; all of said bonds aggregating the sum of forty-six millions of dollars.

The holder of any such bonds is to have no preference over any

other holder of any of said bonds by reason of any priority in date or the time of issuing the same or otherwise.

All of said bonds are secured by a mortgage or deed of trust bearing even date with the bonds constituting series "A," duly executed by said company to D. O. Mills and Lloyd Tevis, San Francisco, California, as trustees, upon its railroad and telegraph lines in the State of California, running from the city of San Francisco in a southerly and southeasterly direction by way of Carnadero Junction, Salinas Valley, and Polonio Pass to the Colorado river at or near the "Needles;" also from Carnadero Junction to San Benito; also from Los Gatos creek via Goshen to the junction with the first mentioned line between Posa creek and Kern river; also from the junction near Tehachapi Pass, via Los Angeles, to the Texas Pacific railroad near Fort Yuma, and also from Los Angeles to Wilmington, on San Pedro bay, aggregating eleven hundred and fifty miles of railroad and telegraph line, with all the rolling-stock, stations, fixtures and franchises for the permanent use thereof, and the appurtenances thereto now owned or held or that may be hereafter required by said company for the permanent use of said railroad and telegraph lines.

Also upon all the lands granted to said company by the Congress of the United States to aid it in the construction of said railroad and telegraph lines, not sold or otherwise disposed of prior to the execution of said mortgage, aggregating, as near as can be estimated, eleven millions of acres.

In testimony whereof, the Southern Pacific Railroad Company has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president and secretary, this first day of April, in the year of our Lord one thousand eight hundred and seventy-five.

————— ————————, *President.*
————— ————————, *Secretary.*

And whereas the said board of directors, at the meeting aforesaid, and in the manner and form and by the vote aforesaid, did further direct that to each of said bonds there should be attached sixty interest coupons, numbered respectively from one to sixty, inclusive, substantially in the following form, to wit:

$30. SOUTHERN PACIFIC RAILROAD COMPANY Series A.

OF CALIFORNIA.

Coupon. Bond No.---------- No. ----------

THIRTY DOLLARS.

Interest due----------

PAYABLE IN THE CITY OF NEW YORK IN UNITED STATES GOLD COIN.

----------, Secretary.

with such changes in amount in the body and in the coupon as shall be necessary to conform to the order of the board of directors

aforesaid in regard to the several amounts or sums which are payable in each class of bonds; and

Whereas, by an act of Congress of the United States of America, approved on the twenty-seventh day of July, A. D. eighteen hundred and sixty-six, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," there was granted to the said Southern Pacific Railroad Company, party of the first part, a large body of public lands of the United States, to wit, every alternate section of public lands, designated by odd numbers, to the amount of ten alternate sections per mile on each side of the railroad and telegraph line of said company running from the Bay of San Francisco to the southeasterly line of the State of California, being about six hundred and thirty-six miles, not sold, reserved, granted, or otherwise appropriated, and free from pre-emption, homestead, or other claims or rights at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office, and such other alternate sections
25 designated by odd numbers as aforesaid, and situated not more than ten miles beyond the limits of the said first alternate sections, which may be selected by said company in lieu of any of the sections first aforesaid which may have been sold, granted, reserved, pre-empted, occupied as homesteads, or otherwise disposed of, or to which other rights may have attached, as provided in the act of Congress aforesaid for the purpose of aiding in the construction of the railroad and telegraph line of the said party of the first part; and

Whereas, by an act of Congress of the United States of America, approved on the third day of March, eighteen hundred and seventy-one, entitled, "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," there was granted to the said Southern Pacific Railroad Company the authority to construct a line of railroad from a point near Tehachapi Pass, by was of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado River, with the same rights, land grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to and imposed upon the said Southern Pacific Railroad Company of California, by the aforesaid act of July twenty-seventh, eighteen hundred sixty-six, before recited, subject to the rights, present and prospective, of the Atlantic and Pacific Railroad Company, which said last line of road is of the length of three hundred and fifty-six and seven one-hundredths miles; and

Whereas, the said board of directors, at the meeting aforesaid, and in the manner and form, and by the vote aforesaid, did further direct that, to secure the payment of said bonds, a first mortgage upon said road and its rolling stock, stations, fixtures, right of way and franchises, and the lands aforesaid granted by said acts of Congress, not sold or otherwise disposed of, or contracted to be sold,

as shown by the books of said company, should be executed under the corporate seal of said company, and be signed by its president and sectetary, to D. O. Mills and Lloyd Tevis, both of the city and county of San Francisco, State of California, as trustees for the holders of said bonds; and

Whereas, said board of directors, at the meeting aforesaid, and in the manner and form, and by the vote aforesaid, did further direct that a sinking fund should be created for the redemption and payment of said bonds, by setting apart the sum of one hundred thousand dollars of the net income of said road in the year eighteen hundred and eighty-two, and each year thereafter until all of said bonds, principal and interest, shall have been redeemed or paid, in trust, to be loaned out at interest, upon good securities, or otherwise invested under the order and direction of said board of directors, or used to redeem said bonds as often as one hundred thousand dollars shall come into the sinking fund, in which case notice shall be published in one paper in the city of San Francisco, and two papers in New York city, that bonds will be redeemed at a price not exceeding their par value, and inviting bids for the surrender thereof at prices to be named, not exceeding the par value of said bonds; the lowest bids less than par to be accepted, and bonds redeemed to the extent of the money in the sinking fund.

Now, therefore, this indenture witnesseth, that the said Southern Pacific Railroad Company, for the better securing of the payment of the principal and interest of the said first mortgage bonds, and in consideration also of the sum of one dollar, to it in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has *granted*, *bargained*, *sold* and *aliened*, *conveyed* and *confirmed*, and by these presents doth *grant*, *bargain*, *sell*, *alien*, *convey* and *confirm* unto the said parties of the second part, and to their successors duly appointed for the execution of the trusts herein set forth, the following property now or hereafter constituted, purchased, acquired, held in possession and owned by said company, to wit: The whole of the railroad and telegraph line of the said company, running from the city of San Francisco, in the State of California, in a southerly and south-easterly direction, by way of Carnadero Junction, Salinas Valley and Polonio Pass to the Colorado River, at or near the "Needles," also, from Carnadero Junction to San Benito; also, from Los Gatos Creek via Goshen, to the Junction with the first mentioned line between Poso Creek and Kern River; also from the Junction near Tehachapi Pass, via Los Angeles, to the Texas Pacific Railroad near Fort Yuma; and also from Los Angeles to Wilmington, on San Pedro Bay, aggregating eleven hundred and fifty miles of railroad and telegraph lines, including all the rights of way, roadway, track and tracks, together with all the superstructures, depots, depot grounds, station houses, watering-places, work-shops, machine-shops, machinery, side tracks, turn-outs, turn-tables, weighing scales, locomotives, tenders, cars, rolling stock of all kinds, full equipments, fixtures, tools, and all other prop-

erty which may be necessarily or ordinarily used in operating or repairing the said railroad, including all of the said property, which is now or may hereafter, in whole or in part, be constructed or completed, purchased, acquired, held, or owned by the said company, pertaining to said railroad, and all the corporate rights, privileges and franchises of said company pertaining to said road, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging and appertaining, and the reversion and reversions, remainder and remainders, rents, incomes, issues and profits thereof, with all the rights, titles, interests, estate, property, succession, claim and demand, in law or equity, of the said party of the first part, of, in and to the same, or any part and parcel thereof; to have and to hold the above granted and described premises, property and franchises, with the appurtenances, unto the said parties of the second part, and to the survivor of them, and to their successors, duly appointed, upon trust and for the use and benefit of the person or persons, body or bodies, politic or corporate, who shall have become, or be from time to time, holders of the said "first mortgage bonds," or any of them. *Provided*, always, and these presents are upon the express condition that if the said party of the first part, or its successors, shall well and truly pay, or cause or procure to be paid unto the holders, from time to time, of said bonds, and each and every one of them, the said sums of money secured to be paid by the said bonds, and interest coupons attached thereto, at the places and times, and in the manner set forth in the said bonds, according to the true intent and meaning thereof, then these presents, and all the property, estate, right, franchises, and privileges herein and hereby granted and conveyed, shall *cease, determine and be void.* But *if default* shall be made in the payment of said sums of money specified in said bonds, or in the pay-
26 ment of said interest coupons, or either of them, or any part thereof, and if the same shall remain unpaid for the period of six months from and after the time when the same should have been paid, according to the terms of said bonds, then the said parties of the second part, or either of them, upon the refusal of the other, or their successors in said trust, by themselves, or their agents, or servants, in that behalf, may, upon request of the holder or holders of not less than one-fourth of said bonds, on which the interest or principal shall so be and have so remained in default, as aforesaid, enter into and upon and take possession of all, or in their or his discretion, any part of the said premises and property hereinbefore described, and work and operate the said railroad, and receive the income, receipts and profits thereof, and out of the same pay: *First*, The expense of running and operating the same, including therein such reasonable compensation as they or he may allow to the several persons employed or engaged in the running and superintendence of the same, and a reasonable compensation to the parties of the second part, or their successors, or such of them as shall act in the premises, for their or his care, diligence, and responsibility

in the premises. *Second*, The expenses of keeping the said road, the appurtenances, the locomotives and the rolling stock thereof in good and sufficient repair, to prevent deterioration in the value thereof, and all other reasonable and proper charges and expenses of the care and management thereof. And *Third*, Pay, as far as the same will suffice, all interest and principal, if any, which may be due on said bonds; and in case of any deficiency, to apply said receipts, after the payment of all said charges and expenses, to the payment thereof, ratably, without preference of any kind, *or the said parties of the second part* may in such case *foreclose this mortgage, and sell* and dispose of, according to law, all the rights, property, privileges, franchises, real and personal, with the appurtenances herein and hereby granted, or so much thereof as may be necessary, and out of the money arising from such sale, pay: *First*, The costs, and charges, and expenses of the foreclosure and sale, including therein reasonable counsel fees for conducting said proceedings, to be allowed and fixed by the Court, but not exceeding thirty thousand dollars. *Second*, Any expenses, costs and charges of the execution of the trust previously incurred and remaining unpaid. *Third*, A reasonable compensation to the trustees, or one of them, who may act, for their or his care, trouble and service in completing the execution of his trust and the distribution of the proceeds of sale, to be fixed by the Court, but not exceeding twenty thousand dollars. And *Fourth*, To distribute the residue of said proceeds among the holders of said bonds, in proportion to their several interests, until all have been paid in full, principal and accrued interests.

And the said party of the first part hereby covenants and agrees that if, at any time, any lands now used for depot or shop purposes, or right of way, or water, or any lands not now used, but which may be hereafter used for such purposes, shall, for any cause, cease to be needed or used by said party of the part for such purposes, the said parties of the second part may sell the same at the price to be agreed upon by the parties of the first and second parts, and apply the money realized from such sale or sales to the redemption of said bonds in the manner hereinafter provided in the case of money realized from the sale of lands granted by the United States to the said party of the first part.

And the said party of the first part hereby agrees and covenants to and with the said parties of the second part, and their successors in said trust, that it will pay all ordinary and extraordinary taxes, assessments, and other public burdens and charges which shall or may be imposed upon the property herein described and hereby mortgaged, and every part thereof, and the said parties of the second part, the survivor of them, or their successors in said trust, or any one or more of the holders of said bonds, may in case of default of the said party of the first part in this behalf, pay and discharge the same, and any other lien or incumbrance upon said property, which may in any way, either in law or equity, be or become in effect a charge or lien thereon, prior to these presents, or to which this

mortgage may be subject or subordinate, and for all payments thus made the parties so making the same shall be allowed interest thereon at the rate of seven per centum per annum, and such payments, with the interest thereon, shall be and are hereby secured to them by these presents, and declared to be payable and collectible in the same sort of currency or money wherein they shall have been paid, and the same shall be payable by said party of the first part to said parties of the second part, upon demand in trust for the party or parties paying the same, and may be paid out of the proceeds of the sale of said property and franchises hereinbefore provided.

And the said party of the first part hereby further covenants and agrees to and with the said parties of the second part, and their successors in said trust, that they will at any and all times hereafter, upon the request of the said parties of the second part, execute, acknowledge and deliver to the said parties of the second part, all and every such further, necessary and reasonable conveyances and assurances of the said premises or any part thereof, as may by the parties of the second part, or the survivor of them, or his or their successors in the trust hereby created, be reasonably advised or required for more fully carrying into effect the objects of this conveyance, and the said parties of the second part, and their successors in said trust, shall be entitled to receive a just and proper compensation for all services rendered by them in the discharge of said trust, and the same shall be deemed to be secured hereby.

And it is hereby stipulated and agreed that the said parties of the second part, and their successors in said trust, shall not be responsible for the acts or omissions of any agent or agents employed by him or them, in any manner, in and about the execution of the trust hereby created when such agent or agents are selected with reasonable discretion; or with the approbation, or with the knowledge and without the express disapprobation of said party of the first part, nor shall either of the said parties of the second part be responsible for any act or omission of the other in the execution of said trust.

And, therefore, this indenture further witnesseth: That the said party of the first part, for the purpose of securing the payment of the sums of money mentioned in said bonds, and the interest thereon, and in consideration of the premises, and also for and in consideration of the sum of one dollar to the said party of the first part in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, has *granted, bargained, sold, released, enfeoffed, conveyed and confirmed*, and by these presents does *grant, bargain, sell, release, enfeoff, convey and confirm* unto the said parties of the second part, as trustees, and to their successors and survivor, and their assigns forever.

All and singular, the said several sections of land so as aforesaid granted by said acts of Congress; and also all the estate, right, title, interest, claim and demand whatsoever, at law or in equity, of, in, or to the same, or any part or parcel thereof, which the said

party of the first part now has, holds, owns, or is entitled
27 to, or hereafter may or shall acquire, have, hold, own, or be or become entitled to by force or virtue of the said acts of Congress; saving, excepting, and reserving all parts and parcels of said lands which have been sold or contracted to be sold or disposed of heretofore, or which are or shall be included in the right of way of the said railroads and telegraph lines of the said company, as defined and granted by the acts of Congress aforesaid, or used for the construction or operation thereof, or for the track, yards, depots, grounds, buildings or erections thereof.

To have and to hold all and singular the lands hereby granted or intended to be granted, and each and every part and parcel thereof, with the appurtenances thereunto belonging, unto the said parties of the second part, and their successors and survivor, and their assigns forever, as trustees, for the uses and purposes, and upon the trusts, terms, conditions, and agreements in this indenture set forth and declared.

Provided, always, and these presents are upon the express condition, that if the said party of the first part shall well and truly pay, or cause to be paid, to the holders of said bonds, and every of them, the principal sums of money therein mentioned, according to the tenor thereof with the interest thereon, at the times and in the manner hereinbefore provided, according to the true intent and meaning of these presents, then and from thenceforth this indenture and the estate hereby granted shall cease and determine, and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part, not then disposed of under the powers hereby conferred, shall revert to and vest in the said party of the first part.

This indenture further witnesseth, that these presents, and the said bonds are made, executed, and delivered upon the trusts, terms, conditions and agreements following, that is to say: That all the lands herein above conveyed and mortgaged shall be under the sole and exclusive management and control of the said party of the first part, who shall have full power and authority to make contracts for the sale of the same at such price, on such credit or terms of payment, and such other conditions as shall be agreed on by the said parties of the first and second parts, and as shall seem to them best calculated to secure the payment in full of all the bonds issued as hereinbefore provided, until entry or foreclosure by the trustees, as hereinafter provided. But no title to any tract of land, contracted to be sold by the said party of the first part, shall be given unto the whole of the purchase money of said tract shall be paid to said parties of the second part, or their successors or survivor, in cash or in said bonds, or overdue coupons thereof. And for this purpose it is agreed that the said party of the first part and said trustees shall cause all such lands, as they shall from time to time become subject to sale, to be carefully examined, and surveyed, and shall affix to each tract or parcel such price as in their judgment shall be most

judicious, having in view the interests of all parties; and said lands shall be and remain at all times thereafter open for sale to any person who may desire to purchase and pay therefor; the prices being, nevertheless, at all times subject to revision and alteration by the said parties; and the party of the first part may reserve from sale any lands necessary for depot grounds, or other purposes connected with the construction or operation of the said railroad or telegraph.

The purchaser of any such land shall be at liberty to pay for the same in the aforesaid bonds or overdue coupons at par; and when any tract or parcel of said lands shall have been purchased and paid for, either in bonds, coupons, or cash, as hereinbefore provided, the same shall be conveyed by the said parties of the first and second parts to the purchaser, in fee simple, and shall by such conveyance be absolutely and forever released from any and all lien or incumbrance, for or on account of said bonds, or any other debt or obligation of the said party of the first part.

Provided, that for the sake of convenience in making said conveyances, the said trustees shall have power to act by attorney, duly nominated and appointed by them, jointly, by letter of attorney, which shall be duly acknowledged and recorded in each and all of the counties in which said lands or any part thereof are situated; and all deeds made in their names by such attorney shall have the same force and effect as if made by them in person.

Provided, further, that the attorney so appointed shall be a resident of the city of San Francisco, in the State of California, and shall reside within convenient reach of the party of the first part.

The said trustees shall and will cancel and discharge each and every bond and the coupons thereon, and all overdue coupons, which they may receive in payment for land, or by purchase, by defacing the seal of the corporation, perforating the signature of the president and secretary and drawing lines across each of the interest coupons, on receipt thereof; and all bonds and coupons received in payment for lands, as aforesaid, shall, when so cancelled, be delivered to the said party of the first part.

The said trustees shall apply the proceeds of the sales made by them of lands hereby conveyed, to the sole and exclusive purpose of the payment of the bonds provided for in, and issued in conformity to, the terms of this indenture.

And for such purpose all such avails shall, from time to time, as the same are realized, be used in the purchase of such bonds in the market, to be cancelled, so long as purchases thereof can be made at par; and whenever such bonds cannot be purchased at that rate, said trustees shall advertise for proposals to sell such bonds to them in two newspapers published in the city of New York, and one newspaper published in the city of San Francisco; and after receiving such proposals they shall have power to purchase such bonds at the lowest terms so offered.

The said party of the first part does hereby covenant and agree

to pay to the holders of said bonds, respectively, the said principal sums of money therein mentioned and the interest thereof as aforesaid.

If any default shall be made in the payment either of principal or interest on any of said bonds for six months, after demand at the place of payment when the same shall become due, then the said trustees may, on being requested by the holders of at least one hundred thousand dollars of such bonds, *enter into and take possession of* any of the lands above conveyed, and *foreclose this mortgage*, and *may sell* at public auction *so much of said*
28 *lands* as may be necessary to discharge all arrears of such interest, and apply the proceeds, after deducting the costs, charges and expenses of such entry, foreclosure and sale, to the payment of such arrears of interest. If any such *default* shall continue *for one year* from the time of such demand and refusal, the principal sum of all bonds then outstanding shall become due and payable, and the said trustees may *enter into and take possession* of all the lands above by these presents mortgaged or conveyed, *foreclose* this mortgage *and sell* at public auction *all said lands* or so much thereof as may be necessary, first giving at least six months previous notice of the time and place of sale in at least one newspaper published in the city of New York, and in one published in each of the cities of San Francisco, Sacramento, Los Angeles and San Diego, and they shall apply the proceeds thereof, after deduct the costs, charges and expenses of such last-mentioned entry, foreclosure and sale, to the payment of all said bonds then outstanding, and the interest accrued thereon, rendering the surplus, if any there shall be, unto the said party of the first part. In case of any sale upon any such foreclosure, or at any such public auction, the said trustees shall make, execute and deliver a conveyance of the said lands so sold, which shall convey to the purchasers all the rights and privileges of the said party of the first part, in and to the property so sold, to the same extent as the same shall have been previously enjoyed and held by the said party of the first part.

If after any such entry shall be made, or any such foreclosure proceedings shall be commenced for the satisfying of interest only, as above provided, and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest and deliver the coupons therefor to the said trustees, and pay all the costs, charges and expenses incurred in such entry and foreclosure, and the proceedings thereon; then, and in every such case, the said trustees shall discontinue their proceedings thereon, and restore to the said party of the first part all of such lands, to be held subject to the above conveyance and mortgage, and subject to all the provisions, terms and conditions of these presents, in like manner as if such entry had not been made, nor such foreclosure proceedings commenced. In case a vacancy shall happen in the number of trustees, hereinbefore mentioned as parties of the second part in this indenture, or if one of them shall be temporarily absent, the

remaining trustee shall, while said vacancy or absence exists, have all the rights, exercise all the powers, and discharge all the duties devolving on the said trustees by said instrument. But as soon as it conveniently may be done, such vacancy shall be filled by the nomination, by the remaining trustee, of some proper person to fill such vacancy, which nomination shall be submitted to the board of directors of said company, and if approved by them, the person so nominated and approved immediately shall become a trustee under this instrument. If said nomination is not approved another person shall be nominated by said remaining trustee, and in like manner submitted for approval, and so on till three nominations have been made. But if three successive nominations shall be made, and none of them shall be approved by said board, said vacancy shall be filled by a committee of three persons, selected—one by said remaining trustee, one by said board of directors, and a third by the two thus selected, and the person appointed trustee by a majority of the committee, shall be and remain a trustee under this instrument. And the person regularly appointed a trustee to fill a vacancy in either of the forms above specified, shall, from and after his said appointment, and his acceptance of the appointment, become vested with the same estates, powers, rights and interests, and charged with the same duties and responsibilities as if he had been one of the original trustees, parties of the second part, named in and executing this instrument; and the prior remaining trustee may and shall execute such conveyances and instruments as may be proper or necessary to vest the same in such new trustee jointly with him, or to furnish evidence of such vesting. If at any time either of the said trustees shall resign his place as trustee by a proper deed in writing to that effect, and such resignation shall be accepted by the said party of the first part, then, and in every such case, the place of such resigning trustee thereupon shall become and be vacant.

Whenever all the bonds which shall have been made and issued by the said party of the first part, under and in conformity to the provisions of this indenture, with the interest thereon, together with all the expenses incurred by the said trustees in the execution of the trust herein and hereby created shall have been fully paid or satisfied, the said trustees shall reconvey to the said party of the first part, all and singular, the said lands then in the hands of the said trustees, and not before that time sold or disposed of in the execution of the trust hereby created. In case the said trustees shall at any time, have any trust moneys on hand, received from the sale of the lands hereby conveyed, which will not be required to meet any immediate liabilities of the company, to which said moneys are by these presents devoted, the said moneys shall be loaned on interest, or deposited on interest with some bank or trnst company in the city of San Francisco or Sacramento, subject to be drawn by checks signed by the trustees, or such one of them as they may designate. All of the books of the said company, and of the trustees, relating to the lands hereby conveyed, shall be mutually open to the inspec-

tion of said company and said trustees. It shall be the duty of the said trustees to certify and deliver to the said party of the first part the said bonds, as the same from time to time shall be demanded, issued or used by the said party of the first part.

And it is hereby mutually agreed by and between the parties hereto, that the said parties of the second part, and their survivor and successors, and their heirs, executors and administrators, shall not be answerable for the acts, omissions or defaults of each other, nor for anything short of their own gross negligence or wilful misfeasance.

It is hereby declared by the parties to this indenture, that all the provisions of said acts of Congress, so far as they are applicable, are hereby made and shall be deemed and taken to be a part of this instrument; and the said provisions in all that concerns the sale and disposal of the said lands hereby conveyed to the parties of the second part, are to be observed and strictly and faithfully carried out and fulfilled.

And the said party of the first part covenants and agrees to and with the said parties of the second part, that the said party of the first part shall and will, at any and all times hereafter, and from time to time, execute, acknowledge and deliver, under its corporate seal, to the said parties of the second part, and their survivors or successors, all such other or further assurances, deeds, mortgages, obligations, transfers, indentures and instruments in writing, and shall and will do and perform all such other or further acts or things as shall or may be necessary or proper, or as their counsel, learned in the law, shall deem necessary, proper or expedient for the better or more effectually securing upon the above conveyed and mortgaged premises, the payment of the said bonds so to be issued, and the interest due and to grow due thereon in manner aforesaid, or for carrying into effect the true intent, design, objects and purposes of these presents. And the said parties of the second part hereby accept the trust created and declared by this instrument, and agree to discharge the same pursuant to the provisions in that behalf herein contained.

In witness whereof, the said Southern Pacific Railroad Company has caused these presents to be signed by its president and secretary, and sealed with its corporate seal, and the above parties of the second part have hereunto set their hands and seal, the day and year first above written.

CHARLES CROCKER,
President Southern Pacific Railroad Company.

[SEAL.]

J. L. WILLCUTT,
Secretary Southern Pacific Railroad Company.

We accept the trust declared in the foregoing instrument.

[SEAL.] D. O. MILLS,

[SEAL.] LLOYD TEVIS, *Trustees.*

STATE OF CALIFORNIA, }
City and County of San Francisco. } *ss:*

On this third (3d) day of July, in the year one thousand eight hundred and seventy-five (1875), before me, Charles J. Torbert, a notary public in and for the said city and county of San Francisco, State of California, duly commissioned and qualified, personally appeared Charles Crocker, known to me to be the president of the Southern Pacific Railroad Company, and J. L. Willcutt, known to me to be the secretary of the Southern Pacific Railroad Company, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal this 3d day of July, A. D. 1875.

[SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, }
City and County of San Francisco. } *ss:*

I, Charles J. Torbert, a notary public in and for the said city and county of San Francisco, State of California, residing in the city of San Francisco, duly commissioned and sworn, do certify that on the sixth (6th) day of July, in the year one thousand eight hundred and seventy-five (1875), personally appeared before me in the city and county of San Francisco, State of California aforesaid, Charles Crocker, president of the "Southern Pacific Railroad Company," and J. L. Willcutt, secretary of the "Southern Pacific Railroad Company," who are both personally known to me to be the said officers of the said "Southern Pacific Railroad Company," respectively, and the individuals described in and who have executed the foregoing instrument as such officers of said company, and they each severally and personally, then and there, acknowleged to me that they executed the said instrument as the free act and deed of the said "Southern Pacific Railroad Company" freely and voluntarily, and for the uses and purposes therein mentioned; and the said J. L. Willcutt, with whom I am personally acquainted, being by me duly sworn, did depose and say that he resides in the city and county of San Francisco, State of California; that he is and was secretary of the "Southern Pacific Railroad Company" at the date and time he executed the foregoing instrument; that he know the corporate seal of said company, and is, and was at the date said instrument, the legal custodian of said seal; that the se affixed to the foregoing instrument was and is such corporate se and was by him so affixed by order of the Board of Directors of t said "Southern Pacific Railroad Company;" that he signed name thereto as secretary of said company by the like order. A the said J. L. Willcutt further said that he was and is acquainte with Charles Crocker, and knows that said Charles Crocker is an

was president of the "Southern Pacific Railroad Company" at the date of said instrument; that the signature of the said Charles Crocker subscribed to said instrument is in the genuine handwriting of the said Charles Crocker, and was thereto by him subscribed by the like order of the Board of Directors of said company, and in the presence of him, the said deponent.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, State of California, the 6th day of July, A. D. 1875.

[SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, }
City and County of San Francisco. } *ss:*

On this seventh (7th) day of July, in the year one thousand eight hundred and seventy-five (1875), before me, Charles J. Torbert, a notary public in and for the said city and county of San Francisco, State of California, duly commissioned and qualified, personally appeared D. O. Mills and Lloyd Tevis, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, State of California, this 7th day of July, A. D. 1875.

[SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

30 Filed for record at the request of D. W. Parkhurst, and recorded in office of the County Recorder of San Mateo county, July 8th, 1875, at 5 p. m., in Liber 11 of Mortgages, at page 2 and following.

Witness my hand and seal of office.

Paid, $22.50.

[SEAL.] GEO. H. RICE, *County Recorder.*
By W. R. THOMAS, *Deputy.*

Filed for record at the request of D. W. Parkhurst, July 9th, A. D. 1875, at 9 o'clock and 26 minutes, a. m., and recorded in Book 15 of Mortgages, at page 156 *et seq.*, Records of the County of Santa Clara, in the State of California.

Witness my hand and seal of office.

Paid, $15.

[SEAL.] W. J. COLAHAN, *County Recorder.*
By F. J. SAXE, *Dep't.*

Filed for record at the request of D. W. Parkhurst, July 9th, A. D. 1875, at 8 o'clock and 53 minutes p. m., and recorded in Book 1 of Mortgages, at page 586 and following. Records of San Benito County, in the State of California.

Witness my hand and seal of office.

Fees $15, paid.

[SEAL.] H. M. HAYES, *Co. Recorder.*

Filed for record at the request of D. W. Parkhurst, July 10th, A. D. 1875, at 8 o'clock, and 10 minutes p. m., and recorded in Volume 17, page 529 and following pages of the Mortgage Records of the County of Santa Cruz, in the State of California.

Witness my hand and seal of said County Recorder.

Paid $15.00.

[SEAL.] H. E. MAKENNEY, *County Recorder*
In and for Santa Cruz County.

Filed for record at the request of D. W. Parkhurst, July 12th, A. D. 1875, at 9 o'clock and 55 minutes, a. m., and recorded in Book 1 of Mortgages, pages 183 and following. Records of the County of Monterey, in the State of California.

Witness my hand and seal of office.

Fees $15, p'd.

[SEAL.] HERBERT MILLS, *County Recorder.*

Filed for record at the request of D. W. Parkhurst, July 13th, A. D. 1875, at six o'clock and 25 minutes, p. m., and recorded in Book "C" of Mortgages, page 540 *et seq.*, Records of the County of San Luis Obispo, in the State of California.

Witness my hand and seal of office of County Recorder.

Fees $15.

[SEAL.] CHAS. W. DANA, *County Recorder.*

Filed for record at the request of D. W. Parkhurst, July 14th, A. D. 1875, at 2 o'clock, and 20 minutes, p. m., and recorded in Book "F" of Mortgages, pages 164 and following, Records of the County of Santa Barbara, in the State of California.

Witness my hand and seal of office of County Recorder.

Fees $15, p'd.

[SEAL.] H. P. STONE, *County Recorder.*
By J. O. B. WENTLING, *Deputy.*

Filed for record at the request of D. W. Parkhurst, July 16th, A. D. 1875, at 8 o'clock, and 40 minutes, a. m., and recorded in Book

15 of Mortgages, page 600, *et seq.*, Records of the County of Los Angeles, in the State of California.

Witness my hand and seal of office of County Recorder.

Fees $15, p'd.

[SEAL.] J. W. GILLETTE, *County Recorder.*
By D. S. LOVEJOY, *Deputy.*

Filed for record at the request of D. W. Parkhurst, July 19th, A. D. 1875, at nine o'clock and 15 minutes, a. m., and recorded in Book Volume 2 of Mortgages, pages 217 and following, Records of the County of Kern, in the State of California.

Witness my hand and seal of office.

Fees $15, p'd.

[SEAL.] F. W. CRAIG, *County Recorder.*

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31 Filed for record at the request of D. W. Parkhurst, Esq., July 20th, A. D. 1875, at 8 o'clock and 15 minutes p. m., and recorded in Book D of Mortgages, pp. 310, *et seq.*, Records of the County of Fresno, in the State of California.

Witness my hand and seal of office of county recorder.

Pd. $15.

[SEAL.] A. M. CLARK, *County Recorder.*
By C. L. WAINWRIGHT, *Deputy.*

Filed for record at request of D. W. Parkhurst, July 21st, A. D. 1875, at 10 o'clock and 30 minutes a. m., and recorded in Book "K" of Mortgages, page 1, *et seq.*, Records of the County of Tulare, in the State of California.

Witness my hand and seal of office of county recorder.

Pd. $15.

[SEAL.] J. E. DENNY, *Recorder.*
By JOHN G. KNOX, *Deputy.*

Filed for record at the request of D. W. Parkhurst, July 23d, A. D. 1875, at 10 o'clock and 40 minutes p. m., and recorded in Book "D" of Mortgages, 544, *et seq.*, Records of the County of San Bernardino, in the State of California.

Witness my hand and seal of office of county recorder.

Paid $15.00.

[SEAL.] SYDNEY P. WAITE, *County Recorder.*
By R. S. SWING, *Deputy.*

Filed for reeord at the request of D. W. Parkhurst, July 26th, A. D. 1875, at 10 o'clock and 20 minutes a. m., and recorded in

Book No. 7 of Mortgages, pages 103, *et seq.*, Records of the County of San Diego, in the State of California.

Witness my hand and seal of office of county recorder.

Fees, $15.

[SEAL.] A. S. GRANT, *County Recorder.*
By E. G. HAIGHT, *Deputy.*

Filed for record at the request of D. W. Parkhurst, July 28th, A. D. 1875, at 24 minutes past 4 p. m., and recorded in Book No. 2 of Mortgages, pages 46, *et seq.*, Records of the County of Ventura, State of California.

Witness my hand and seal of office of county recorder.

Fees, $18.

[SEAL.] JOHN T. STOW, *County Recorder.*

Recorded at request of D. W. Parkhurst, August 3d, A. D. 1875, at 1 p. m., in Liber 443 of Mortgages, page 309, in the office of the county recorder of the city and county and county of San Francisco, State of California.

[SEAL.] O. H. FRANK, *County Recorder.*

Recorded at request of Wells, Fargo & Co., August 20, 1880, at 20 min. past 9 a. m., in Book 1 of Mortgages, page 557, *et seq.*, Records of Merced county.

$15.

[SEAL.] E. J. HAMILTON, *County Recorder.*
By M. H. WALSH, *Deputy.*

Recorded at request of Wells, Fargo & Co., August 23d, A. D. 1880, at 5 min. past 9 o'clock a. m., in Vol. 15 of Mortgages, at pages 139, *et seq.*, Records of Stanilaus county.

$15, paid.

[SEAL.] JOHN McCOY, *Recorder.*

Recorded at request of J. L. Willcutt, September 6th, 1880, at 30 minutes past 10 o'clock a. m., in Liber 624 of Mortgages, page 305, in the office of the county recorder of the city and county of San Francisco.

[SEAL.] W. K. DIETRICH, *County Recorder.*
Per RICHARD BLAUVELT, *Deputy.*

31½ Answer endorsed: Due service of the within answer admitted this 16th day of May, 1883. J. H. Campbell, dist. att'y. Filed May 17, 1883. W. H. Owens, clerk, by H. E. Wilcox, deputy clerk.

Petition.

32 In the Superior Court, County of Santa Clara, State of California.

THE COUNTY OF SANTA CLARA, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, (a Corporation,) Defendant. } No. 6780.

To the Honorable the Superior Court in and for the County of Santa Clara, State of California:

Your petitioner, the Southern Pacific Railroad Company, respectfully shows—

That your petitioner is the sole defendant in the above-entitled action now pending in this honorable court.

That said action was brought on the 13th day of April, 1883, the complaint therein having been duly filed on said date.

That the defendant has on this day, and before the filing of this petition, appeared in said action and filed an answer to the complaint of plaintiff.

That no term of this court has been held since this action; and this petition is filed before the term at which the cause could be first tried.

That no trial of said action has been had, and this petition is filed before the trial thereof.

That said action is a suit of a civil nature at law, and arising under the Constitution and laws of the United States, and that the matter in dispute exceeds, exclusive of costs, the sum and value of five hundred dollars.

That said action is brought by the plaintiff to recover from the defendant on account of taxes claimed by the plaintiff to be due and payable from the defendant for State and county purposes, as will more fully appear by a reference to the plaintiff's complaint on file herein.

33 That the assessment described in the complaint and answer, and which the plaintiff in this action claims to be due and payable, is an assessment which the State Board of Equalization of the State of California pretended to make, under and by virtue of the authority conferred upon the Board, by section 10 of article XIII of the State constitution.

That the defendant claims in this action that said provisions of the constitution of the State of California, and the authority thereby conferred upon said State Board of Equalization, violate the provisions of the Fourteenth Amendment to the Constitution of the United States in this, that its effect is to deprive the defendant of its property without due process of law, and that under it the defendant is denied any protection from the general laws of the State of California, which—

First. Require that property shall be taxed in proportion to its value.

Second. Require such proportions to be ascertained by a general law.

Third. Require, before the liability is fixed, that the right to be heard must be given.

Fourth. Which give an appeal from the assessor to another tribunal.

Fifth. Require the assessment to be made in the county, and prevent its being made in localities distant from the *situs* of the property.

Sixth. Prescribe the mode and manner of the assessment; and

Seventh. Which allow deductions from indebtedness secured by mortgage.

Eighth. Which require property to be assessed at its actual value.

That in the assessment and apportionment described and mentioned in the answer, the franchise of the defendant and the whole thereof is included in the valuation, and so blended with the other assessments and valuations that it cannot be distinguished therefrom; and defendant claims in this action that, under and by virtue of the acts of Congress of July 27th, 1866, and March 3d, 1871, (which acts are referred to in said answer,) the defendant was, by the Government of the United States, selected as an instrument and means of that Government to carry into execution the said several acts of Congress; and defendant further claims in this action that, under and by virtue of said several acts of Congress, the State has no power to impose a tax upon the franchise or operations of defendant, and that such tax violates the provisions of said several acts of Congress.

That prior to the 1st day of January, 1881, the defendant was indebted to divers persons, citizens of the United States, and many of them then and now citizens and *bona fide* residents of the State of California, and others of them then and now citizens and *bona fide* residents of other States of the Union, in large sums for moneys advanced to construct and equip its railroad described in the answer herein. That to secure the payment of such indebtedness the defendant, long prior to the said day, executed and delivered a mortgage upon its railroad and all rolling stock and appurtenances, and upon a large number of tracts of land situated in different counties of the State of California, which said tracts of land then were, and ever since have been, the property of defendant. That said indebtedness exceeded, and still exceeds, three thousand dollars per mile of said road. That no part thereof has ever been paid except the accruing interest, and that the whole thereof is now, and since the execution of said mortgage has been, a valid and subsisting indebtedness against said company defendant, and has been and still is secured by said mortgage.

That the said pretended assessment, made as aforesaid by said

State Board of Equalization, included the whole value of said property without any deduction therefrom. That under the constitution of the State of California, when property, other than property such as is described in the complaint, is assessed and valued for the purposes of taxation, it is the duty of the assessor making such valuation to deduct from the value of such property all indebtedness secured by mortgage or lien upon the property. That the supreme court of the State of California, the highest tribunal in said State, has decided that defendant (and others similarly situated) is not entitled to the protection of the Fourteenth Amendment of the Constitution
34 of the United States, is not a means or instrument of the Federal Government; that its franchise is assessable and subject to taxation without the consent of the Federal Government; and that defendant and others similarly situated, are not entitled to the reduction hereinbefore referred to. That said decision of the supreme court of the State of California is in full force, and is binding upon the inferior courts of the State, and especially upon this court. That the facts stated in the answer herein are true, which answer defendant refers to and makes part of this petition. That defendant is the corporation mentioned in the said several acts of Congress hereinbefore referred to, and that the railroad of defendant which has been assessed by the State Board of Equalization is the road constructed, operated, and maintained by defendant under the said several acts of Congress. That the plaintiff in said action will rely upon the decision of the supreme court of the State of California, and that the construction of said several acts of Congress and of the Fourteenth Amendment to the Constitution of the United States is in this action disputed, and must necessarily be adjudged and determined herein; and that if said adjudication and determination be in favor of defendant and against that heretofore made by the supreme court of the State of California, such adjudication and determination will be conclusive in favor of defendant upon the merits of this action. That this is a suit arising under the Constitution and laws of the United States.

That your petitioner has made and filed with this petition a bond in the penal sum of five thousand dollars, with good and sufficient surety, conditioned that your petitioner shall enter in the circuit court of the United States, to be held in the district of California, in the ninth circuit, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto; and also shall appear in said circuit court and enter special bail in said suit if special bail was originally requisite therein, and shall do all such other and further appropriate acts as by the act of Congress, approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," are requisite to be done

upon removal of a suit in a circuit court of the United States from a State court; and your petitioner is ready and willing to give such other and further bonds, and to do all such other act as may be lawfully required.

Your petitioner therefore prays that this honorable court will accept this petition and said bond and proceed no further in said suit, and that said suit may be removed into the circuit court of the United States in and for the district of California, in the ninth circuit, as required by statute of the United States in such cases made and provided.

And your petitioner will ever pray, etc.

J. B. LAMAR,
Attorney for Petitioner.
S. W. SANDERSON
and CREED HAYMOND,
Of Counsel.

Endorsed: Filed May 17, 1883. W. H. Owens, clerk, by H. E. Wilcox, deputy.

35 *Bond.*

In the Superior Court, county of Santa Clara, California.

THE COUNTY OF SANTA CLARA, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, (a corporation,) Defendant.
No. 6780.

Know all men by these presents, that we, the Southern Pacific Railroad Company, as principal, and Charles F. Crocker and S. T. Sage as sureties, are held and firmly bound unto the county of Santa Clara, plaintiff, in the sum of five thousand dollars, to be paid to the said plaintiff, for which payment, well and truly [to] be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this fourteenth (14th) day of of May, 1883.

Whereas, the above-entitled action was brought on or about the 13th day of April, 1883, in the superior court, in the county of Santa Clara, State of California, and the same is now pending in said superior court, by said the county of Santa Clara, against said Southern Pacific Railroad Company, and is removable into the circuit court of the United States in and for the district of California, in the ninth circuit, under and by that certain act of Congress of the United States, approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes."

And whereas, said the Southern Pacific Railroad Company has made, and is about to file herewith, its petition in said suit in said

superior court, in and for the county of Santa Clara, State of California, for the removal of said suit into said circuit court of the United States, to be held in the said district of California, in the ninth circuit.

Now, the condition of this obligation is such, that if said the Southern Pacific Railroad Company shall enter in such circuit court
36 of the United States on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also shall there appear and enter special bail in such suit if special bail was originally requisite therein, and shall do all such other appropriate acts as by the said act of Congress are required to be done upon the removal of a suit from a State court into the circuit court of the United States, then this obligation to be void, otherwise to remain in full force and virtue.

[SEAL.] SOUTHERN PACIFIC RAILROAD CO.,
By J. L. WILLCUTT, *Secretary.*
CHAS. F. CROCKER. [SEAL.]
S. T. SAGE. [SEAL.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss.*

Chas. F. Crocker and S. T. Sage, the sureties in the foregoing obligation, being each sworn, each for himself, says: That he is a resident of the State of California and a freeholder therein, and is worth the sum of five thousand dollars over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

CHAS. F. CROCKER.
S. T. SAGE.

Subscribed and sworn to before me, this fourteenth 14*th* day of May, 1883.

[SEAL.] CHAS. J. TORBERT,
Notary Public, in and for the City and County of San Francisco, State of California.

I hereby approve of the above sureties, and accept and approve the foregoing bond.

Dated May 17th, 1883.

FRS. E. SPENCER,
Judge Superior Court, County of Santa Clara.

Endorsed: Filed May 17th, 1883. W. H. Owens, clerk, by W. E. Wilcox, deputy.

Order Allowing Removal of Cause.

37 Superior Court of the County of Santa Clara, State of California.

THE COUNTY OF SANTA CLARA, Plff.,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, Deft.

Upon reading and filing the petition of the defendant, asking that the above-entitled action be removed into the circuit court of the United States in and for the District of California, &c., and a good and sufficient bond in conformity with law and the practice of this court, having been approved and filed, it is ordered that said cause be in accordance with said petition, and for the reason therein set forth, removed into the circuit court of the United States in
38 and for the district of California, in the ninth circuit, as required by statute of the United States in such cases made and provided.

Dated May 17th, 1883.

FRS. E. SPENCER,
Superior Judge.

Endorsed: Filed May 17th, 1883. W. H. Owens, clerk, by H. E. Wilcox, deputy.

Clerk's Certificate.

39 I, W. H. Owens, county clerk of the county of Santa Clara, State of California, and ex-officio clerk of the superior court of said county, do hereby certify the foregoing to be a full, true, and correct copy of the whole of the record in the within action of the county of Santa Clara *vs.* The Southern Pacific Railroad Company, now on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said superior court, this 18th day of May, 1883.

[SEAL.] W. H. OWENS,
County Clerk.

Endorsed: In the circuit court of the United States, for the district of California. Certified copy of record. Filed July 3, 1883. L. S. B. Sawyer, clerk.

Stipulation Waiving Jury.

40 At a stated term, to wit, the July term, A. D. 1883, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the courtroom, in the city and county of San Francisco, on Wednesday, the

25th day of July, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Lorenzo Sawyer, circuit judge.

COUNTY OF SANTA CLARA
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 3074.

It is hereby stipulated by and between the above-entitled parties that the above-entitled action be tried, both upon issues and fact as well as of law, by and before the court, without a jury, a jury
41 being hereby expressly waived.

Dated San Francisco, July 25th, 1883.

J. H. CAMPBELL,
Dist. Att'y Santa Clara Co., Att'y for Pl'ff.
McALLISTER & BERGIN,
Att'ys for Def't.
E. C. MARSHALL,
Att'y Gen'l.
L. D. McHISICK,
Att'y for Defendant.
J. B. LAMAR AND
H. S. BROWN,
Att'ys for Def't.

Endorsed: Filed July 25th, 1883. L. S. B. Sawyer, clerk.

Findings.

42 In the Circuit Court of the United States, Ninth Circuit, District of California.

THE COUNTY OF SANTA CLARA,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 3074.

The above entitled cause having, on the 25th day of July, 1883, been brought on to a hearing before the court, without a jury, the said parties by stipulation in writing, filed with the clerk, having waived a jury; and the evidence introduced by the respective parties having been fully considered, the court finds the facts in issue in said action as follows:

I.

Defendant's Organization.

In the year 1865 a corporation, under the name of the Southern Pacific Railroad Company was duly organized under an act of the Legislature of the State of California, approved May 20, 1861, entitled, "An act to provide for the incorporation of railroad companies, and the management of the affairs thereof, and other matters

relating thereto;" and the term of its existence was fixed at fifty years from the date of its organization.

II.

On the 24th day of July, 1860, the San Francisco and San Jose Railroad Company was duly incorporated under the laws of the State of California.

III.

The Legislature of California on April 2, 1866, passed an act entitled, "An act to authorize all the counties south of Santa Clara county to aid in the construction of the Southern Pacific Railroad;" which statute is found in the statutes of 1865–6, at page 816 *et seq.* Also, a statute on March 30, 1868, entitled "An act to confer power upon the board of supervisors of the city and county
43 of San Francisco;" which is found in the statutes of California for the years 1867–8, at page 716. Also, "An act to empower the city and county of San Francisco to aid in the construction of the Southern Pacific railroad, and other purposes;" which is found in the statutes of California, 1869–70, at page 707 *et seq.* All of which statutes are herein referred to and made a part of these findings.

IV.

On July 27, 1866, Congress passed an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," which act of Congress is found in the United States Statutes at Large, vol. 14, at page 292 *et seq.*, and which act is herein referred to and made a part of this finding.

V.

In November, 1866, the Atlantic and Pacific Railroad Company duly filed its acceptance of said act of Congress in the office of the Secretary of the Interior.

VI.

On the thirtieth day of November, 1866, said Southern Pacific Railroad Company duly filed in the office of the Secretary of the Interior at Washington its acceptance of the said act of Congress of July 27, 1866.

VII.

The Legislature of the State of California, on April 4, 1870, passed an act entitled "An act to aid in giving effect to an act of Congress relating to the Southern Pacific Railroad Company," which act is found in the Statutes of California for 1869, '70, at pages 883, and is hereby referred to and made a part of this finding.

VIII.

On March 3, 1871, Congress passed an act entitled "An act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," which statute is found in Vol. 16 U. S. Statutes at Large, at pages 573 *et seq.*, and which is hereby referred to and made a part of this finding.

IX.

On May 2, 1872, Congress passed "An act supplementary to an act entitled 'An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,' approved March 3, 1871;" which act is found in Vol. 17, U. S. Statutes at Large, pages 59 *et seq.*, which statute is hereby referred to and made a part of this finding.

X.

As such corporation, and in pursuance of the acts of the Legislature of California and acts of Congress referred to in these findings, said Southern Pacific Railroad Company con-
44 structed a line of railroad, and procured the rolling-stock and all the appurtenances thereunto belonging, known and designated as the Southern Pacific railroad, described as follows: Commencing on the waters of the Pacific Ocean in the city and county of San Francisco, and extending in a southerly direction through portions of the county of San Francisco, and through the county of Santa Clara to Tres Pinos, in the county of San Benito, with a branch therefrom running from Carnadero, in the county of Santa Clara to Soledad, in the county of Monterey. Said line of railroad also extends from Huron, in Fresno county to Goshen, in Tulare county, and thence in a southerly direction by the way of Tehachapi Pass, Mohave, and Los Angeles, to the Colorado river at Fort Yuma, with three branches from said line at Los Angeles, extending respectively to Santa Monica, Wilmington, and Santa Ana, in the county of Los Angeles. Said line of railroad is connected with the Texas and Pacific railroad at Sierra Blanca in the State of Texas, by three railroads, to wit: The Southern Pacific railroad, (of Arizona,) extending from Fort Yuma to the eastern boundary line of Arizona, the Southern Pacific railroad, (of New Mexico,) extending from said eastern boundary line across New Mexico to the western boundary of Texas, and the Galveston, Harrisburg, and San Antonio railroad, extending from said last named boundary to Sierra Blanca. Said several railroads are operated as one continuous line, except the connection made over the Central Pacific road, as stated in finding No. XXXIII, from a point near Marshall, in Texas, to the Pacific ocean at San Francisco, for the uses and purposes, and in the manner contemplated by the acts of Congress hereinbefore referred to. From Tres Pinos to Huron the said Southern Pacific railroad has not

been completed, but, pending its construction, connection between said points is made over the line of the Central Pacific railroad. Defendant, since the commencement of this action, has completed the construction of the said Southern Pacific railroad to the Colrado river at or near the Needles to connect with the Atlantic and Pacific railroad, hereinafter referred to, and with the said Atlantic and Pacific railroad, when completed, making a continuous line from Springfield, in the State of Missouri, to the Pacific ocean, with the same exceptions as to the connection over the Central Pacific, as contemplated by the act of Congress hereinbefore referred to, chartering the Atlantic and Pacific Railroad Company.

XI.

Length of the Road in the several Counties.

Of said Southern Pacific railroad (of California) there had been, prior to the first Monday in March, 1880, completed, and there was in operation in the several counties through which it runs, 711.51 miles, to wit: In the city and county of San Francisco, 7.36 miles; in the county of San Mateo, 25.10 miles; in the county of Santa Clara, 59.30 miles; in the county of Santa Cruz, 2.15 miles; in the county of San Benito, 17.65 miles; in the county of Monterey,
45 49.28 miles; in the county of Fresno, 17.93 miles; in the county of Tulare, 61.98 miles; in the county of Kern, 117.83 miles; in the county of Los Angeles, 139.48 miles; in the county of San Bernardino, 54.60 miles; and in the county of San Diego, 158.85 miles, and all within the State of California.

XII.

Said Atlantic and Pacific Railroad Company has nearly completed, and will within a short time, have fully completed the whole of said road from Springfield to the Colorado river, and defendant has constructed said road as aforesaid to Mojave, with the exception hereinbefore set out, and has completed the construction thereof from said Mojave to the junction of the road of the Atlantic and Pacific Company at Colorado river.

XIII.

On December 17th, 1877, the Southern Pacific Railroad Company and the Los Angeles and San Pedro Railroad Company, San Francisco and San Jose Railroad Company, and other railroad corporations, then duly incorporated and existing under the laws of the State of California, were duly amalgamated and consolidated under the provisions of the statutes of California, and a new corporation was formed, to wit, the defendant in this action. Since then said defendant has been, and still is, a corporation, existing under the laws of the State of California, except in so far as its organization, existence, corporate character, and rights may be affected or modified by the Federal and State statutes referred to in these findings.

XIV.

A few days after March 29th, 1882, and within due time, the secretary of the defendant filed with the State Board of Equalization the statement required by section 3664 of the Political Code of California, which statement was sworn to on said 29th day of March, and it is in the words and figures following, to wit:

EXHIBIT 30.

The Southern Pacific Railroad Company makes the following statement in relation to its property subject to taxation in the State of California, owned by it for year ending on the first Monday of March, A. D. 1882, and of all property used in operating or repairing its railway in this State during such year and its actual value:

The entire length of railroad of said company in California is 714.51 miles, operated in the following counties of said State, with the length of railroad in each county:

County.	*Iron.*	*Miles.*
San Francisco	----	7.36
San Mateo	----	25.10
Santa Clara	42.30	59.30
Santa Cruz	2.15	2.15
San Benito	17.65	17.65
Monterey	49.20	49.28
Fresno	----	17.93
Tulare	31.26	61.98
Kern	50.36	117.83
Los Angeles	79.71	142.48
San Bernardino	49.25	54.60
San Diego	----	158.85
		714.51

46 *Rolling Stock.*

The actual amount in detail of rolling stock in use on and property used in operating and repairing the line of railway of said company in this State during the year ending the first Monday in March, 1882, and the value of the same, respectively:

No.	*Kind.*	*Value.*
45	Locomotives, $5,000	$225,000 00
1	Sleeping car	3,000 00
50	Passenger cars, $2,500	125,000 00
22	Emigrant and smoking cars, $1,000	22,000 00
15	Baggage, express, and mail cars, $800	12,000 00
5	Cabooses, $500	2,500 00
564	Box freight cars, $350	197,400 00
368	Flat freight cars, $250	92,000 00
247	Dump, hand, section, and all other cars, $40	9,880 00
	Other stock	
	Total value	$688,780 00

SOUTHERN PACIFIC RAILROAD COMPANY,
AUDITOR'S OFFICE, SAN FRANCISCO,
March 29, 1882.

Statement showing the gross receipts of the S. P. R. R. Co. and the Santa Cruz R. R. Co., from January 1st to December 31st, 1881:

Northern division of the S. P. R. R.	$1,158,014 78
Leased portion	1,650,600 00
Total	$2,808,614 78
Santa Cruz R. R. Co., (Apr. 30 to Dec. 31,)	26,347 71

CHAS. J. ROBINSON, *Auditor.*

Acc't commences April 30th, 1881—

Expenses were	$48,439 13
Earnings	26,347 71
Loss	$22,091 42

The following shows the value of said property on the first Monday of March aforesaid, meridian, the gross earnings of the entire railway and the proportionate annual gross earnings of the same in this State, as near as practicable, for the year ending first Monday in March, 1882, and all property of every kind situate in this State, owned by said company, and its value:

	Miles.	*Value per mile.*	*Total value.*
Franchise	714.51	$ 03.50	$ 25 00
Road way	"	430 00.00	307,239 30
Road bed	"	1,270 00.00	907,427 70
Rails	"	5,100 00.00	3,644,001 00
Total		6,800 03.50	4,858,693 00
Rolling stock		963 98.93	688,780 00
Grand total		$7,764 02.43	$5,547,473 00

47 Annual earnings for the year ending Dec'r 31, 1881—

Annual gross earnings for entire railway operated	$1,158,014 78
Proportionate annual gross earnings of the railway in the State	$

The following is a description of the entire length of the railway of said company in this State, beginning at one of its termini, and thence following the road-way and right of way for said railway, describing it by metes or bonds, or other description sufficient to identify it, *through each county*, giving the points of entrance and exit to and from each county it traverses, to the other termini in the State.

Beg. at depot, bl'k 369, San Francisco, running th. S. W'ly in

N. W. cor. of N. P. bl'k 133; th. w'ly through N. P. blocks 99, 98, 69, 68, 45, 44, 23, 21, 6, 7, 8 to Harrison st.; th. sou. line of Harrison st. to 22d st.; then S. W'ly through Mission bl'ks 139, 153, 171, 170, 184, to San Jose ave.; th. in same course to corner of Dolores and 27th st.; th. s'ly to the center of the N. line of b'lk 29, Fairmount tract; th. S. W'ly to a point on N. line San Mateo co.; th. continuing S. E'ly through town of San Mateo and Redwood City to a point on San Francisquito creek S. of and near Menlo Park; th. in same course through Mayfield and town of Santa Clara to depot in San Jose; th. S. E'ly through the city of San Jose to town of Gilroy; th. in same course to a point on Pajaro river, intersected by N. E. ¼ of N. E. ¼ of sec. 27, t. 11 S., r. 4 E.; th. S. E'ly through Hollister to depot at Tres Pinos.

Also, beg. at Carnadero, in Santa Clara county; running th. S. to S. E. cor. Santa Cruz cy.; th. S'ly through S. E. cor. Santa Cruz co. to center of railroad bridge across Pajaro river; th. W'ly through sand cut to Pajaro; th. S'ly through Castroville and Salinas city to depot at Soledad; said description constituting what is known as the northern division of S. P. R. R., and being 160.84 miles in length.

Also, beg. at Huron, in Fresno co., running th. E'ly through Lemoore and Hanford to Goshen, in Tulare co.; th. S'ly through town of Tulare to N. line of Kern co., at a point near and N. of Delano; th. continuing in a S. E'ly and S'ly direction through Sumner, Tehachapi Pass and Mojave to N. line of Los Angeles co.; th. in a general S. W'ly and S'ly direction to San Fernando tunnel; th. through said tunnel and San Fernando station to depot in city of Los Angeles; running th. E'ly through city of Los Angeles to line of San Bernardino county; th. continuing S. E'ly through town of Colton to the intersection of N. line of San Diego county with San Gorgonia Pass; th. continuing S. E'ly through San Diego co. to center of channel of Colorado river.

Also, running from depot in city of Los Angeles W'ly to end of wharf at San Pedro Point, being known as the southern division of S. P. R. R. and 553.67 miles in length.

The following is a description of all other property of every kind owned by said company located in the State, with the value thereof.

San Francisco County.

Part of N. P. bl'k 6, beg. N. W. cor. Columbia and El Dorado sts.; th. N. 96¾ ft.; S. W. 9.11 ft.; E. 29¼ ft. to beg.

48 Part of N. P. bl'k 7, beg. at N. E. cor. Harrison and Center sts.; th. N. 47.5¾ ft.; N. E. 92.1 ft.; E. 50 ft.; S. W. 142 ft.; W. 82.21 ft. to beg.

Part N. P. bl'k 8, beg. at S. E. cor. Harrison and Center sts.; th. S. 75 ft.; N. E. to S. line of Center st. 22 ft. E. from beg.; E. 22 ft. to beg.

Part of M. B. 169, being ½ lot 22; lots 23 and 24 (90 x 162.6 ft.)

Part of M. B. 184, beg. on W. line Valencia st. 30.5 ft. S. of 25th st.; th. S. 34.7 ft.; W. to right of way of R. R.; N. E. to beg.

Part of M. B. 184, beg. on S. line of 25th st. 7.9½ ft. W. of Valencia st.; th. W. 82.2½ ft. to alley; th. S. to R. R.; N. E. to beg.

Part of M. B. 184, beg. at S. E. cor. of 25th st. and Old San Jose road; th. E. 90 ft. to alley; th. S. 61 ft. to right of way of R. R.; th. S. W. to E. line of San Jose road; th. N. 118.8 ft. to beg.

Part of M. B. 184, beg. on S. line of right of way of R. R., 90 ft. E. from Old San Jose road, and 94.3 ft. S. from 25th st., th. S. 33.9 ft.; W. 61 ft.; N. E. to beg.

Lots 24 and 25 in block 380, O'Neil and Haley tract.

" "A" and "B" " 266, South San Francisco.

Tract b'd N. by Mount Vernon ave., E. by Otego st., S. by block "A," and W. by Old San Jose road.

All personal property.

Stanislaus County.

34,364 acres of land.

Merced County.

30,087 acres of land.

Fresno County.

16 miles of telegraph line.
Reservation and imp'ts at Huron and other points.
41,725 acres of land.

Tulare County.

61.98 miles of telegraph line.
Reservation and imp'ts at Tipton.
" " " " Tulare.
" " " " Hanford.
" " " " Lemoore.
" " " " Goshen and all other points.
307,169 acres of land.

Kern County.

117 miles of telegraph line.
Reservation and imp'ts at Delano.
" " Lerdo.
" " Sumner.
" " Pampa.
" " Caliente.
" " Bealville.
" " Tehachapi.
" " Cameron.
" " Mohave.
" " Kern, and all other points.
171,430 acres of land.

49 The following is a description of all other property of every kind owned by said company located in the State, with the value thereof.

Los Angeles County.

130.48 miles of telegraph line.

Tract of land at Wilmington: Beg. near the intersection of W. line of bl'k 16, R. 2, with water line of bay; point marked "R. R. D.; th. N. 29½° W. 198 ft.; S. 80¾° W. 182 ft.; S. 37½° W. 813 ft.; S. 9½° E. 332.6 ft.; S. 75½° W. 44 ft.; S. 1½° E. 752 ft.; S. 29° E. 158 ft.; N. 62½° E. 92.6 ft; N. 35¼° E. 150 ft.; N. 26½° E. 1,518 ft. to beg. Less land in right of way of R. R.

Impts. on same, (wharf, etc.)

Reservation and impts. at San Fernando.

" " Ravenna.
" " Newhall.
" " El Monte.
" " San Gabriel.
" " Savannah.
" " Spadra.
" " Pomona.
" " Compton.
" " Florence.
" " Dominquez.
" " Cerito.

All personal property.

39,172 acres of land.

City of Los Angeles.

9 miles of telegraph line.

Tract of land, being portion of "Huerta Molino," beg. on W. line of Toma or Alameda St., 8.67 chs. S. 40° W. from S. cor. of the Carbajare or Banning tract; S. 40½° W. 9.15 chs.; th. 32½° W. 6 chs.; th. N. 57½° W. 9.75 chs. to W. line of tract; th. N. 35° E. 12.30 chs.; N. 47½° E. 3.45 chs.; S. 56° E. 9.60 chs. to place of beg. 19 acres.

Impts. on same.

Lot 1 in sec. 5, T. 2 S., R. 13 W. 2 acres.

All personal property.

San Bernardino County.

54.60 miles of telegraph line.

Reservation and impts. at Colton and all other points.

All personal property.

39,168 acres of land.

San Diego County.

158.85 miles of telegraph line.

Reservation and impts. at Indio.
" " Seven Palms.
" " Palm Springs.
" " Cabazon.
All personal property.
6,620 acres of land.

San Mateo County.

11.50 miles of telegraph line.
Small tract of land at Colma, b'd S. and E. by county road, N. E. by railroad, 50 x 871 ft.
Impts. at same.
Small tract of land at Millbrae, occupied by R. R. Co.
Impts. on same.
All personal property.

50 The following is a description of all other property of every kind owned by said company located in the State, with the value thereof:

Lots 5, 3, 4, in bl'k 10; E. ½ of bl'k 12, lots 1 to 6, bl'k 13.
All of bl'k 14; W. ½ of bl'k 15, lots 10 to 12, bl'k 16.
Lots 7 to 12, bl'k 18, and W. ½ of bl'k 19.
Imp'ts on above.
Eight miles of telegraph line.
Tract of land at Belmont, occupied by R. R. Co.
Imp'ts on same.
All personal property.
N. part of villa lots 13 and 14, range "A."
Bl'k 5, range "A."
Bl'ks 28 and 29, in E'rn Add'n, with land lying between.
S. ½ of villa lots 22, 23, and 24, range "A."
Imp'ts on above.
Tract of land at Menlo Park, occupied by R. R. Co.
Imp'ts on same.
Tract of land at Hays' Landing.
5.60 miles of telegraph line.
All personal property.

Santa Clara County.

Part of Roble's rancho; beg. at intersection of center line of R. R. with line bet. lots 76 and 77; th. W. 330 ft.; S. E'ly 1300 ft.; N. E. 330 ft.; th. at right angles 1300 ft. to beg., saving right of way.
Imp'ts on same.
Tract of land at "Mountain View;" beg. at intersection of center line of R. R., with E. side of road leading to Rice's Landing; th. S. 63° 53′ E., 2973.3 ft. to land of John Sullivan; th. S. 15° W., 174 ft.; N. 63° 53′ W., 2921.6 ft. to road to Rice's Landing; th. N'ly 190.3 ft. to beg. Saving land in right of way of railroad.
Imp'ts on same.
Tract of land at "Murphy's" Station; beg. at intersection of

center line of R. R. with N. W. line of road leading to Congress Springs; th. N. 67° 53′ W., 33.6 ft.; S. 22° 07′ W., 200 ft.; S. 67° 53′ E., 933.6 ft. to said road; th. N. 22° 07′ E., 200 ft. to beg. Saving right of way of R. R.

Tract of land at "Lawrence;" beg. at a point on S. side of R. R., near the corner of a fence; th. S. 1½° E., 56 ft. along said fence; S. 86° 20′ E., 260 ft. to center of a road leading to Alviso; th. N'ly 60 ft.; N. 88° W., 260 ft. to beg.

Imp'ts on same.

Tract of land in "San José;" b'd N. by land of Ryland; E. by San Pedro st.; S. by Dame st.; W. by the Guadalupe river. Same tract now occupied by S. P. R. R.; also tract adjoining.

Imp'ts on same.

S. ½ of lot 5, and all lot 8, in bl'k 3, range S, San Jose.

Imp'ts on same.

Tract of land in Gilroy, beg. at a point 130 ft. distant from S. E. cor. Monterey st. and old Gilroy road; th. to land of Thomas; th. S. along W. line of Thomas' land to Thomas' N'ly fence; th. W. to a point 130 ft. E'ly from Monterey st.; th. N. to beg. Saving land covered by right of way of R. R.

Imp'ts on same.

51 Lot b'd E. by right of way; S. by Thomas'; W. by Monterey st.; N. by land of Farmer; 900 ft. on Monterey st. by 130 ft. deep.

Reservation and imp'ts at Santa Clara.

" " Sargents.

" " Coyote.

The following is a description of all other property of every kind owned by said company located in the State, with the value thereof.

59.30 miles of telegraph line.

All personal property.

3,204 acres of land.

San Benito County.

17.65 miles of telegraph line.

Tract of land in Hollister, occupied by R. R. Co.

Imp'ts on same.

Reservation and imp'ts at Tres Pinos.

All personal property.

2,466 acres of land.

Santa Cruz County.

2.15 miles of telegraph line.

Tract of land being part of Sec. 11, T. 12 S., R. 3 W.; b'd N. and E. by Santa Clara line, S. by S. and W. by W. boundary of Sec. 11.—13½ acres.

All personal property.

Monterey County.

49.28 miles of telegraph line.

Tract of land at Salinas City, occupied by R. R. Co. and containing exclusive of right of way, 20 acres, imp'ts on same.
Tract of land at Pajaro, occupied by R. R. Co., and containing, exclusive of right of way, 14.07 acres.
Imp'ts on same.
Tract of land at Castroville, occupied by R. R. Co., and containing exclusive of right of way, 15 acres.
Imp'ts on same.
Tract of land at Soledad, occupied by R. R. Co., and containing exclusive of right of way, 20 acres.
Imp'ts on same.
Reservation of 10 acres in "Bueno Esperanza" rancho.
Reservation of 20 acres at Chualar.
Imp'ts on same.
Reservation of 20 acres at Gonzales.
Reservation of 6.91 acres in San Vincente rancho.
All personal property.
1,958 acres of land.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } *ss.*

J. L. Willcutt being duly sworn, depose, and says that he is the secretary of the Southern Pacific Railroad Company, the principal place of business of which company is in the city and county of San Francisco. That the foregoing statement is in all respects correct and true.

J. L. WILLCUTT.

Subscribed and sworn to before me, this 29th day of March, 1882.

CHARLES J. TORBERT,
Notary Public.

52 XV.

Afterwards, on Saturday, April 22, 1882, the State Board of Equalization met, and Mr. E. Black Ryan, an authorized agent of said defendant, appeared before said board, at said meeting, as agent of said defendant, and asked the privilege of filing a supplementary statement on behalf of defendant, and asking that the Southern Pacific railroad should be assessed in its two divisions, as the same is operated, and the board granted him until Tuesday next, April 25th, to file such supplementary statements. The supplementary statements were then on said day filed, and the said board on Thursday, April 27th, in pursuance of said request and of said supplementary statements, assessed said Southern Pacific railroad in two divisions—the northern division and southern division—said Ryan only appeared at the time stated to request said board to assess said road in two divisions, which was granted. He was not present at the assessment, nor at any time afterwards, and appeared at no other time, and for no other purpose than as herein stated. The said supplemental statements filed on April 25th, relating to the northern division of said road, are in the words and figures following, to wit:

EXHIBIT 31.

The northern division of the Southern Pacific Railroad Company makes the following statement in relation to its property subject to taxation in the State of California owned by it, for year ending on the first Monday of March, 1882, and of all property used in operating or repairing its railway in this State during each year and its actual value.

The entire length of above railroad of said company in California is 160.84 miles operated in the following counties of said State, with the length of railroad in each county:

County.	*Miles.*	
San Francisco	7.36	
San Mateo	25.10	
Santa Clara	59.30	
Santa Cruz	2.15	Supplemental
San Benito	17.65	return.
Monterey	49.28	
Total	160.84	

Rolling Stock.

For rolling stock see original return.

The following shows the value of the franchise possessed by said company for operating its railway, and the values of its road-way, road-bed, rails, and rolling stock described in this statement on the first Monday of March aforesaid, meridian, the gross earnings
53 of the entire railway and the proportionate annual gross earnings of the same in this State, as near as practicable, for the year ending first Monday in March, 1882, and all property of every kind situate in this State, owned by said company, and its value:

	Miles.	*Value per mile.*	*Total value.*
Franchise	160.84	----------	$ 25 00
Roadway	------	$1,700 00	273,428 00
Road-bed	------	1,270 00	204,266 80
Rails	------	4,455 48	716,619 40
Total	------	$7,425 48	$1,194,339 20
Rolling-stock	------	963 99	155.048 15
Grand total	------	$8,389 47	$1,349,387 35

Annual earnings for year ending first Monday March, 1882, see original return.

NOTE.—Of the above 112 miles old iron rails, at $4,000 per mile ---------- $448,000
48.84 miles steel rails, at $5,500 per mile ---------- 268,620

$716,620

The following is a description of the entire length of the railway of said company in this State, beginning at one of its termini, and thence following the roadway and right of way for said railway, describing it by metes or bounds, or other description sufficient to identify it, through each county, giving the points of entrance and exit to and from each county it traverses to the other termini in the State:

San Francisco.

Beg. at a depot in 100 vara blk 369, thence S. W'ly along townsend street to N. W. cor. N. P. blk 133, th. W'ly through N. P. blk 99 and 98–69–68–45–44–23, th. S. W'ly through N. P. blks 21–6–7–8 to Harrison street, th. S. on Harrison street to 22d street, th. S.W'ly through M blks 139, 153, 171, 170, 184, 169 to San José avenue; th. on same course to cor. of Dolores and 27th street; th. S'ly to center N. line of blk 29, Fairmont Tract; th. S.W'ly to intersection of said R. R. with N. line of San Mateo county, 7.36 miles.

San Mateo County.

Beg. at last-named point, running th. in a SE'ly direction through San Bruno, Millbrae, San Mateo, Redwood City, and Menlo Park to intersection of N. line Santa Clara county with R. R. bridge across San Francisquito creek near Menlo, 25.10 miles.

Santa Clara County.

Beg. at last-named point, running SEly through Mayfield and Santa Clara to depot in city of San José; th. SE'ly through city of San José to town of Gilroy; th. to Carnadero; th. S'ly and W'ly to S. E. corner Santa Cruz county, 51.25 miles.

Also, from Carnadero, running SE'ly toward Hollister, to intersection of N. line of San Benito county with R. R. bridge crossing Pajaro river, 8.5 miles.

54 *San Benito County.*

Beg. at last named point, running th. S. E'ly through Hollister to depot in Tres Pinos, 15.25 miles.

Also, part of main line running through NW. corner San Benito county, bet. sand-cut and R. R. bridge across Pajaro river, 2.40 miles.

Santa Cruz County.

Running through S. E. corner of Santa Clara county from W'ly line Santa Clara county to intersect N'ly line San Benito county, 2.15 miles.

Monterey County.

Beg. at a point near sand-cut on the line of San Benito county; thence W. to Pajaro; th. in a general S'ly direction to Castroville;

th. S. E'ly through Castroville station, Salinas City, and Chualar to depot at Soledad, 49.28 miles.

I, E. W. Maslin, do certify that I am the clerk of the State Board of Equalization; that the foregoing is a true copy of the so-called supplemental statement of the Southern Pacific Railroad Company relating to the assessment of the northern division of said railroad for 1882, now on file in the office of the said Board.

July 24, 1883.

E. W. MASLIN,
Clerk State Board of Equalization.

The said supplemental statement, filed by said Ryan, on April 25th, relating to said Southern Division of said road, is in the words and figures following, to wit:

EXHIBIT 32.

The *Southern Division* of the *Southern Pacific* Railroad Company makes the following statement in relation to its property, subject to taxation in the State of California, owned by it for year ending on the first Monday of March, A. D. 1882, and of all property used in operating or repairing its railway in this State during such year, and its actual value.

The entire length of above railroad of said company in California is 553.67 miles, operated in the following counties of said State, with the length of railroad in each county:

County.	*Miles.*	
Fresno	17.93	
Tulare	61.98	
Kern	117.83	Supplemental
Los Angeles	142.48	Return.
San Bernardino	54.60	
San Diego	158.85	
Total	553.67	

Rolling Stock.

For rolling stock, see original return.

55 The following shows the value of the franchise possessed by said company for operating its railway, and the value of its roadway, road-bed, rails, and rolling-stock described in this statement on the first Monday of March aforesaid, meridian, the gross earnings of the entire railway, and the proportionate annual gross earnings of the same in this State, as near as practicable, for the year ending first Monday in March, 1882, and all property of every kind situate in this State, owned by said company, and its value:

	Miles.	Value per Mile.	Total Value.
Franchise	553.67	$0 00	$25 00
Roadway	"	65 00	35,988 55
Road-bed	"	1,270 00	703,160 90
Rails	"	4,929 45	2,729,288 58
Total		$6,264 45	$3,468,463 03
Rolling-stock		964 00	533,737 88
Grand Total		$7,228 45	$4,002,200 91

Annual earnings for the year ending first Monday in March, 1882, see original returns.

NOTE: Of the above 210.60 miles old iron rails, at $4,000 per mile $842,400
343.07 miles steel rails, at $5,500 per mile 1,886,885

Total $2,729,285

The following is a description of the entire railway of said company in this State, beginning at one of its termini, and thence following the roadway, and right of way for said railway, describing it by metes or bounds, or other description sufficient to identify it through each county, giving the points of entrance and exit to and from each county it traverses, to the other termini in the State.

Fresno County.

Beg. at Huron, in said county, running th. E'ly to W'ly line of Tulare county, T. 19 S., R. 18 E., 17.93.

Tulare County.

Beg. at last-named point, running th. E'ly to Goshen, 21.98 miles. Also beg. at Goshen, at end of C. P. R. R., running th. in a general S'ly direction, through Tulare and Tipton, to a point on N. line of Kern county, 1½ miles N. of Delano, 40 miles.

Kern County.

Beg. at last-named point, running th. S. through Delano and Poso to Lerdo; th. S. E'ly through Sumner, Caliente, Tehachapi, to Loop and Mojave, to a point on the N. line Los Angeles county, to 117.83 miles.

Los Angeles County.

Beg. at point on S. line Kern county, running th. S. 20 miles, more or less; th. S. W'ly and W'ly through Soledad Cañon to Newhall; th. S'ly through San Fernando tunnel; th. S. E'ly
56 through San Fernando to city of Los Angeles; th. E'ly through San Gabriel, El Monte, and Spadra to W. line San Bernardino county, E. of and near Pomona, 142.48 miles. Also from depot in Los Angeles, running S. through Florence, Compton, and Wilmington to San Pedro Point, 24.25 miles.

San Bernardino County.

Beg. on W. line said county, about two miles E. of Pomona, running th. E. through Cucamonga and Colton to Mound City; th. S. E'ly through San Gorgonio and San Gorgonio Pass to N. line San Diego county. Also, short curve in San Bernardino county, E. from last named point, 54.60 miles.

San Diego County.

Beg. on a point on S. line of San Bernardino county; th. E'ly in short curve to said S. line. Also, beg. at point in San Gorgonio Pass, on S. line San Bernardino county; th. E'ly through Indian Wells and Dos Palmos to center of R. R. bridge across Colorado river, 158.85 miles.

OFFICE STATE BOARD OF EQUALIZATION.

I, E. W. Maslin, do certify that I am the clerk of the State Board of Equalization, and that the foregoing is a true copy of the so-called supplemental return or statement of the Southern Division of the Southern Pacific Railroad Company, made to the said board for the year 1882, by said company, and filed in the office of said board in pursuance of section 3664 of the Political Code of the State of California.

Witness my hand, this the 24th day of July, 1883.

E. W. MASLIN,
Clerk State Board of Equalization.

XVI.

ASSESSMENT OF STATE BOARD NOT GIVEN IN EVIDENCE ON TRIAL.

No record of assessment as made by said State Board of Equalization was introduced in evidence on the trial; and there was no other evidence as to the assessment in question than as shown by the documents set out in these findings, or as shown by the facts stated in the findings.

XVII.

The following is a copy of the assessment-roll for the county of Santa Clara, for the year 1882, so far as it relates to the tax in question in this case, and includes said tax, and is the only evidence of the assessment of said tax; no other record of the assessment, as made by the State Board of Equalization, having been introduced, to-wit:

Taxpayer's name.	DESCRIPTION OF PROPERTY. Real Estate other than City and Town Lots—Subdivisions of Sections, or Metes and Bounds; City and Town Lots; Improvements; Personal Property.	Value of the franchise, roadway, road bed, rails, and rolling-stock of railroads as apportioned to the Co. by the State Board of Equal'n.	Total value of all property after deductions. (Changes by the county Boards of Equalization to be noted in red ink.)	Total value after Equal'n by the State Board of Equal'n.	Total Tax.	REMARKS.
Southern Pac. R. R. Co.	OFFICE OF THE STATE BOARD OF EQUALIZATION, SACRAMENTO, *May* 12, 1882. TO HIRAM FAIRFIELD, *Assessor of Santa Clara County:* SIR:—The State Board of Equalization, on the 27th day of April, 1882, assessed for the year 1882, the Southern Pacific Railroad Company, Northern Division, for its franchise, roadway, road-bed, rails, and rolling-stock, in the State of California, in the aggregate sum of $2,412,600. The entire length of main track of said division railway of said company in the said State is 160 84-100 miles. The length of the main track of said railway in Santa Clara County is 59 30-100 miles. The description of the whole of the main track of the said railway of the Southern Pacific Railroad Company, and the right of way for the same, in the county of Santa Clara, is as follows: Beginning at the intersection of railroad bridge, across San Francisquito Creek, near Menlo Park, with the north line of Santa Clara county; running thence southeasterly through Mayfield and Santa Clara to depot in city of San Jose; thence southeasterly through city of San Jose to town of Gilroy; thence to Carnadero; thence southerly and westerly to southeast corner of Santa Cruz county, 51 25-100 miles. Also, from Carnadero, running southeasterly towards Hollister to intersection of north line of San Benito county with railroad bridge crossing Pajaro river 8 65-100 miles, The assessed value per mile of said railway as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling-stock of such railway, of the said company, within this State, is $15,000. The apportionment of the assessment of the said franchise, roadway, road-bed, rails, and rolling-stock by this board for and to Santa Clara county is $889,500. WARREN DUTTON, *Chairman*, T. D. HEISKELL, JAMES L. KING, D. M. KENFIELD, WM. JOHNSTON, *State Board of Equalization.* E. W. MASLIN, *Clerk.*	$ 889,500	$ 889,500	$ 889,500	$ cts. 13,342 50	Special School Tax Hester District, on $26,700. Tax, $24.03.

(Duly certified by the Auditor.)

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XVIII.

The Board of Supervisors of Santa Clara county made an apportionment of said tax among the legal subdivisions of said county, which apportionment is in the words and figures following, to wit:

EXHIBIT 7.

MONDAY, *June* 5, 1882.

The Board of Supervisors of Santa Clara county met pursuant to adjournment at 10 o'clock a. m. Present: H. M. Leonard, Chairman of the Board, and Supervisors Kell, Snow, Weathers, Ayer, Main, and Rea. The following proceedings were had, to wit:

Pursuant to section 3664 of the Political Code of the State of California, the board now declares the length of the main track and the assessed value thereof of the Southern Pacific, Central Pacific, and South Pacific Coast Railways, lying in each city and township, town, school district, and lesser taxing districts in said Santa Clara county, to be as set forth in the following tables, to wit:

NAME.	SOUTHERN PACIFIC.		CENTRAL PACIFIC.		SOUTH PAC. COAST.	
	Miles.	Valuation.	Miles.	Valuation.	Miles.	Valuation.
San Jose	2.86	$42,900	1.31	$35,370		
Santa Clara	1.20	18,000			.96	$6,528 96
Gilroy	1.53	22,950				
SCHOOL DISTRICTS.						
Alviso					4.10	$27,884 10
Braly	2.08	$31,200				
Burnett	6.56	98,400				
Cambria					2.04	13,874 04
Carnedero	10.84	162,600				
Encinal	5.83	87,450				
Franklin	3.57	53,550				
Gilroy	7.87	118,050				
Hamilton					2.78	18,906 78
Hester	1.78	26,700			3.54	24,075 54
Jefferson	2.10	31,500			3.11	21,151 11
Lexington					3.99	27,135 99
Los Gatos					4.08	27,748 08
Live Oak	.06	900				
Mayfield	3.91	58,650				
Mt. View	4.21	63,150				
Milpitas			3.63	$98,010		
Oak Grove	4.56	68,400				
Orchard			3.56	96.120		
Santa Clara	1.20	18,000			.96	6,528 96
San Jose	2.86	42,900	1.31	35,370		
San Ysedro	.40	6,000				
Summit					2.80	
Whisman	1.47	22,050				

TOWNSHIPS.

Alviso					2.65	$18,022 65
Burnett	11.20	$168,000				
Fremont	9.96	149,400				
Gilroy	19.16	287,400				
Milpitas			3.63	98,010		
Redwood					11.77	80,047 77
Santa Clara	6.21	93,150			10.58	71,954 58
San Jose	12.77	191,550	4.87	131,490	2.40	16,322 40

59 SUPERVISOR DISTRICTS.

Number.						
1. Inside City	.61	9,150	.15	4,050		
1. Outside City	2.09	31,350			2.40	16,322 40
2. Inside City	.60	9,000	1.16	31,320		
2. Outside City			3.56	96,120		
3. Inside	1.65	24,750				
3. Outside	7.82	117,300				
4.	6.21	93,150			10.58	71,954 58
5.	9.96	149,400	3.63	98,010	2.65	18,022 65
6.	11.20	168,000			11.77	80,047 77
7.	19.16	287,400				

[*Duly certified by the County Clerk.*]

XIX.

The following is a copy of the delinquent list for the said year so far as it relates to the tax in question, to wit:

EXHIBIT 4.

Taxpayers' Names, Southern Pacific R. R. Company.

OFFICE OF THE STATE BOARD OF EQUALIZATION,
SACRAMENTO, *May* 12, 1882.

TO HIRAM FAIRFIELD, *Assessor of Santa Clara County:*

SIR: The State Board of Equalization on the 27th day of April, 1872, assessed for the year 1882 the Southern Pacific Railroad Company, northern division, for its franchise, roadway, road-bed, rails, and rolling-stock, in the State of California, in the aggregate sum of $2,412,600. The entire length of main track of said division railway of said company in the said State is 160.84 miles. The length of the main track of said railway in Santa Clara county is 59.30 miles. The description of the whole of the main track of the said railway of the said Southern Pacific Railroad Company, and the right of way for the same in the county of Santa Clara, is as follows: Beginning at the intersection of railroad bridge across the San Francisquito Creek, near Menlo Park, with the north line of Santa Clara county; running thence southeasterly through Mayfield and Santa

Clara to depot in city of San Jose; thence southeasterly, through city of San Jose, to town of Gilroy; thence to Carnadero; thence southerly and westerly to southeast corner of Santa Cruz county, 51.25 miles. Also, from Carnadero, running southeasterly toward Hollister, to intersection of of the north line of San Benito county with railroad bridge, crossing Pajaro river, 8.05 miles. The assessed value per mile of said railway, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, road-way, road-bed, rails, and rolling-stock of such railway of the said company, within this State, is $15,000. The apportionment of the assessment of the said franchise, road-way, road-bed, rails and rolling stock by this board for and to Santa Clara county is $889,500.

60

WARREN DUTTON,
Chairman.
T. D. HEISKELL,
JAMES L. KING,
D. M. KENFIELD,
WM. JOHNSTON,
State Board of Equalization.

E. W. MASLIN, *Clerk.*

Value of the franchise, roadway, road-bed, rails, and rolling stock of railroads as apportioned to the county by the State Board of Equalization.	Total value of all property after deduction.	Total Tax.	When Paid.	Remarks.
$889,500	$889,500	$13,342 50	Feb. 26, 1883, property was offered for sale, but there being no bona fide bids was withdrawn. F. M. PFISTER, Tax Collector.	Special school tax. Hester district, on $27,600. Tax, 24.03.

[*Duly certified by the County Auditor.*]

XX.

On October 3, 1882, in pursuance of section 3738 of the Political Code of California, the Board of Supervisors of Santa Clara county passed an order entered in the minutes dispensing with the duplicate assessment-roll for that county for that year.

XXI.

The controller of the State transmitted a letter to the tax col-

lector of Santa Clara county in pursuance of the provisions of section 3899 of the Political Code, directing the tax collector of Santa Clara county to offer the property in question for sale but once, and if there were no *bona fide* purchasers to withdraw it from sale, which letter is in the words and figures following, to wit:

EXHIBIT 5.

OFFICE OF CONTROLLER OF STATE,
SACRAMENTO, *February* 13, 1883.

To the Tax Collector of Santa Clara County:

SIR: When any tax upon the property of the Southern Pacific Railroad Company, assessed by the State Board of Equalization for the year 1882, is delinquent, and it so appears on the delinquent list in your county, and which amounts to three hundred dollars ($300), you will offer such property but once for sale, in the manner provided by law; and if there is no purchaser therefor, in good faith, you are directed not to proceed in the collection of such delinquent tax due upon such property and upon which the tax is a lien; and thereafter you will please make out and deliver to me certified copies of the entries upon the delinquent list relative to such tax.

Respectfully yours,

JOHN P. DUNN, *Controller.*
Per F. T. DUNN, *Deputy.*

61 XXII.

On or about the eleventh day of April, A. D. 1883, the tax collector of the county of Santa Clara, in obedience to the provisions of section 3899 of the political code of California, transmitted to the controller of the State of California, with his indorsement thereon of the action had in the premises, a certified copy of the entry upon the delinquent list relative to the tax in question in this action, which document so transmitted to the said controller is in the words and figures following, to wit:

[*Delinquent.*] *Assessment Book of the Property of Santa Clara County, for the year* 1882.

ASSESSED TO ALL KNOWN OWNERS OR CLAIMANTS, AND WHEN UNKNOWN TO UNKNOWN OWNERS OR CLAIMANTS.

Taxpayer's name.	DESCRIPTION OF PROPERTY. Real Estate other than City and Town Lots—Subdivisions of Sections, or Metes and Bounds; City and Town Lots; Improvements; Personal Property.	Value of the franchise, roadway, road bed, rails, and rolling-stock of railroads, as apportioned to the Co. by the State Board of Equal'n.	Total value of all property after deductions. (Changes by the county Boards of Equalization to be noted in red ink.)	Total value after Equal'n by the State Board of Equal'n.	Total Tax.	REMARKS.
Southern Pac. R. R. Co.	OFFICE OF THE STATE BOARD OF EQUALIZATION, SACRAMENTO, *May* 12, 1882. TO HIRAM FAIRFIELD, *Assessor of Santa Clara County:* SIR:—The State Board of Equalization, on the 27th day of April, 1882, assessed for the year 1882, the Southern Pacific Railroad Company, Northern Division, for its franchise, roadway, road-bed, rails, and rolling-stock, in the State of California, in the aggregate sum of $2,412,600. The entire length of main track of said division railway of said company in the said State is 160 84-100 miles. The length of the main track of said railway in Santa Clara County is 59 30-100 miles. The description of the whole of the main track of the said railway of the said Southern Pacific Railroad Company, and the right of way for the same, in the county of Santa Clara, is as follows: Beginning at the intersection of railroad bridge, across San Francisquito Creek, near Menlo Park, with the north line of Santa Clara county; running thence southeasterly through Mayfield and Santa Clara to depot in city of San Jose; thence southeasterly through city of San Jose to town of Gilroy; thence to Carnadero; thence southerly and westerly to southeast corner of Santa Cruz county, 51 25-100 miles. Also, from Carnadero, running southeasterly toward Hollister to intersection of north line of San Benito county with railroad bridge crossing Pajaro river 8 5-100 miles. The assessed value per mile of said railway as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling-stock of such railway, of the said company, within this State, is $15,000. The apportionment of the assessment of the said franchise, roadway, road-bed, rails, and rolling-stock by this board for and to Santa Clara county is $889,500. WARREN DUTTON, *Chairman*, T. D. HEISKELL, JAMES L. KING, D. M. KENFIELD, WM. JOHNSTON, *State Board of Equalization.* E. W. MASLIN, *Clerk.*	$ 889,500	$ 889,500	$	$ cts. 13,342 50	Special School Tax, Hester District, on $26,700. Tax, $24.03.

(See next page for indorsement and certificate.)

62 Febr'y 26, 1883.—Property was offered for sale, but there being no *bona fide* bids was withdrawn.

F. M. PFISTER, *Tax Collector.*

OFFICE OE THE TAX COLLECTOR
OF THE COUNTY OF SANTA CLARA,
State of California, } *ss:*

I, F. M. Pfister, county treasurer and ex officio tax collector of the county of Santa Clara, State of California, hereby certify the foregoing to be a full, true, and correct copy of the original delinquent tax list of said county, now in my office, as such tax collector, and all entries thereon relative to the taxes levied and assessed against the Southern Pacific Railroad Company, a corporation organized and existing under the laws of California, and its property within said county for the year 1882.

F. M. PFISTER,
Tax Collector Santa Clara County.

Dated April 11th, 1883.

I, John P. Dunn, controller State of California, do hereby certify that the foregoing is a true and correct copy of the delinquent tax list received by me from F. M. Pfister, tax collector Santa Clara county, relative to the delinquent taxes of the Southern Pacific Railroad Co. for the year 1882.

Witness my hand and seal of office, affixed at Sacramento, Cala., this 30th day of July, A. D. 1883.

JCHN P. DUNN, *Controller.*

XXIII.

The controller of State, in pursuance of the provisions of the same section, transmitted to the tax collector of said county a letter directing him to bring suit, which letter is in the following words, to wit:

EXHIBIT 6.

OFFICE OF CONTROLLER OF STATE,
SACRAMENTO, *April* 19, 1883.

F. M. FISTER, Esq., *Tax Collector Santa Clara County:*

SIR. Having received from you a certified copy of the entries upon the delinquent assessment list of your county for the year 1882, as they appear relative to the tax upon the property of the Southern Pacific (northern division) Railroad Company, it becomes my duty to direct you to bring suit against said Southern Pacific (northern division) Railroad Company for the collection of such delinquent tax, together with the additional percentage and costs. This direction is in accordance with the provisions of section 3899 of the Political Code, as shown by the following extract:

"And the tax collector, or controller, in case the tax collector refuses or neglects, for fifteen days *after being directed to bring suit* for

collection by the controller, may proceed by civil action in the proper court, and in the name of the people of the State of California, to collect such tax and costs."

You will please acknowledge the receipt of this, and advise me of your intended action.

Respectfully yours,

JOHN P. DUNN, *Controller.*

63 XXIV.

Indebtedness of Defendant Secured by Mortgage.

On the first day of April, 1875, the defendant was indebted to divers persons, in large sums of money advanced to construct and equip the defendant's railroad, hereinbefore described. To secure the payment of such indebtedness, the defendant, on the said first day of April, 1875, executed and delivered a mortgage to D. O. Mills and Lloyd Tevis upon said Southern Pacific Railroad, its franchises, and all rolling-stock and appurtenances, and upon a large number of tracts of land, aggregating over eleven million acres, situated in different counties in the State of California, which said tracts of land were, and ever since have been, the property of the defendant, and which said indebtedness amounts to the sum of $32,520,000, no part of which has ever been paid, except the accruing interest; and the sum $1,632,000 of the principal and the whole of the balance of said principal sum, amounting to $30,898,000, is, and ever since the execution of said mortgage has been, a valid and subsisting indebtedness against said company, and has been, and still is, secured by said mortgage, a copy of which, with the indorsement thereon, is annexed to the answer in this case, which is hereby referred to, and made a part of this finding, which said mortgage was duly recorded on the date mentioned in the indorsement thereon, in the county of Santa Clara, as well as in all other counties through which said railroad runs, as shown by the several indorsements thereon.

XXV.

At the session of the Legislature of 1881, a bill was introduced in the Assembly of said Legislature, of which the following is a true copy, and that such proceedings were thereupon had in the said Legislature as are hereinafter set forth. Said bill was an amendment to section 3664 of the Political Code of the State of California, which section, prior to said amendment, read as follows, to-wit:

Section 3664: "On or before the first Monday in May, in each year, the State Board of Equalization shall assess the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county. The president, secretary, cashier, or managing agent, or such other officer as the State Board of Equalization may designate, of any corporation operating any railway in more

than one county in this State, shall furnish said Board, on or before the first Monday of April in each year, a statement, signed and sworn to by one of such officers, showing in detail for the year ending on the first Monday in March in such year:

(*a.*) The whole number of miles of railway owned, operated, or leased in the State by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind located in the State.

(*b.*) Also a detailed statement of the number and value
64 thereof of engines, passenger, mail, express, baggage, freight, and other cars or property used in operating or repairing such railway in this State, and on railways which are parts of lines extending beyond the limits of this State. The return shall show the actual amount of rolling stock in use on the corporation's line in the State during the year for which the return is made. The return shall show the amount of rolling stock, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in this State, as nearly as practicable, and all the property designated hereafter in this section, and such other facts as the State Board of Equalization may in writing require.

If such officer or officers so designated shall fail to make and furnish such statement, said Board of Equalization shall fix the value of and proceed to assess the property of the corporation so failing; the valuation fixed by them shall be final and conclusive. The said property shall be assessed at its actual value.

Assessments shall be made upon the entire railway within the State, and shall include the right of way, road-bed, track, bridges, culverts, and rolling stock. The depots, station grounds, shops, buildings, and gravel-beds shall be assessed by the assessor of the county where situated as other property. On or before the fifteenth day of May, in each year, said Board shall transmit to the county assessor of each county through which any railway, operated in more than one county, may run, a statement showing the length of the main track or tracks of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by metes and bounds, or other description sufficient for identification, and the assessed value per mile of the same, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling stock of such railway within this State.

Said statement shall be entered on the assessment roll of the county. At the first meeting of the Board of Supervisors, after such statement is received by the county assessor, they shall make and cause to be entered in the proper record-book an order stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, school district, or lesser taxing district in their county through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the taxable value of said property for taxable purposes in

such city, town, township, school, road, or other district; and the clerk of the Board of Supervisors shall transmit a copy of each order or equalization to the city council or trustees, or other legislative body, of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. The taxes on said property for State and county purposes, after collection by the county collector, shall be paid over to the county treasurer as other taxes. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, school districts, and lesser taxation districts."

And the said amendment is in the following words:

"respectively, any person dissatisfied with an assessment made by said Board of Equalization against his or its property may, within five days after such assessment is made and entered of record on the
65 books of said Board, by written petition apply to said Board, to have the same corrected in any particular. Said petition must state the grounds of objection to such assessment, and must be filed with the clerk of the Board. The Board must fix a time for hearing said petition, which must not be less than five nor more than ten days from the time the same is filed, and must, upon such hearing, receive such proofs as may be offered by the petitioner, or by the attorney general, or any other person appearing against such petition, and such other proofs as, in the judgment of the Board, bear upon the question at issue. By an order of the Board or upon the demand of the petitioner the proofs shall be reduced to writing by a phonographic reporter. If the Board do not order the proofs to be reduced to writing by such reporter, but the same is done upon the demand of the petitioner, the petitioner must pay the expenses thereof. After hearing such proofs the Board shall, within ten days, determine, in writing, upon the matters involved in the petition and proofs, and may alter, in confirmity with such determination, the assessment complained of. Any person feeling aggrieved at such determination who shall pay the tax upon the assessment complained of, and may, within ten days after such payment, bring an action in the superior court in the county in which the tax, or any part thereof, has been paid against the Board of Equalization, and in the complaint may allege any fact averred in his petition filed with said Board, showing the illegality of such tax in whole or in part, or that the property in whole or in part was assessed for more than its actual value.

A copy of the complaint must, within thirty days after it has been filed, be served upon the chairman or clerk of said Board, and said Board shall have thirty days in which to answer or demur to the same. At the time the Board answers or demurs it may demand that the suit be tried in the superior court of Sacramento county.

The provisions of the code of civil procedure relating to plead-

ings, proofs, trials, and appeals shall be applicable to the proceedings herein provided for, and the testimony taken before the Board of Equalization may be read in evidence; and in such proceeding the court shall have power to determine the matters involved in the issue, and in making such determination may ascertain whether the property was taxed or assessed in proportion to its value, and if the determination is in favor of the petitioner, as to the illegality of the tax in whole or in part in excess of its actual value, it shall, by its judgment, direct the return of the tax paid, or of such part thereof as may have been illegally exacted, or exacted in excess of the actual value of the property.

Upon presentation of a certified copy of such final judgment to the controller, he shall draw his warrant upon the State treasurer for the amount of such judgment, and the treasurer shall pay the same out of any funds in the State treasury not otherwise appropriated. At the next settlement made thereafter by the controller with the county treasurer of any county that received any portion of said illegal tax, he shall require the treasurer thereof to pay such portion into the State treasury to reimburse the State for the advance made on said judgment. The Board of Equalization may direct the district attorney of any or every county interested, and the attorney general, to defend for such Board any proceedings commenced under the provisions of this section."

66 The said amendatory bill was entitled "An act to amend an act to establish a political code, approved March 12, 1872, by adding thereto two new sections, to be known as sections 3664 and 3665, relating to the assessments of the railroads and other property by the State Board of Equalization and county assessors, for the purposes of taxation." Said bill, in the due course of business, was passed by the Assembly, and contained all the matter which is found in said section 3664 as first above quoted.

Having passed the Assembly, the bill was transmitted to the Senate. The Senate amended section 3664 by adding thereto the latter portion of the matter hereinbefore quoted. Upon the return of the bill to the Assembly, the following proceedings were had, as appears on the journal of that body:

"The consideration of Senate amendment to Assembly bill No. 475: 'An act to amend an act entitled an act to establish a political code,' approved March 12, 1872, by adding thereto two new sections, to be known as sections 3664 and 3665, relating to assessments of railroads and other property, by the State Board of Equalization and county assessors, for the purpose of taxation," resumed.

"The previous question was demanded by Messrs. Edwards, Jackson, and Paulk.

"The ayes and noes were demanded by Messrs. Paulk, Whipple, and Del Valle.

The roll was called, and the House refused to order the main question, by the following vote:

"Ayes—Messrs. Arick, Brown, Burns, Cameron, Crank, Daggett, Edwards, Gay, Geary, Gilmore, Hartshorn, Hoitt, Holden, Jackson, Jones, Kellogg, Kilburn, Lane, May, McCallion, McClure, McDonald, Mein, Mudgett, Noonan, Patterson, of San Joaquin, Reddick, Reynolds, Streeter, Swift, Wasson, of Ventura, Wasson, of Mono, Young, and Mr. Speaker—34.

"Noes—Messrs. Baker, of Sacramento, Baker, of Yolo, Birney, Bost, Branch, Chandler, Colman, Crumpton, Cunningham, Del Valle, Felton, Fraser, Freer, Garrity, Gavigan, Griffith, Hale, Hendrick, Henshaw, Howard, Keating, Leach, Leake, Lewis, Long, Matthews, of Tehama, Matthews, of San Benito, McMurray, Murphy, O'Connor, Patterson, of Nevada, Paulk, Pinder, Platt, Samuels, Sargent, Siebe, Van Fleet, Wentz, Wertsbaugher, Whipple, and Wood—42."

After the transaction of other business, the *printed* journal proceeds:

"The consideration of Senate amendment to Assembly bill 475, resumed.

"The question recurred on concurring therewith.

"The ayes and noes were demanded by Messrs. Paulk, Sargent, and Wentz.

"The roll was called, and the Speaker declared the House had concurred in the Senate amendments.

"Ayes—Messrs. Arick, Baker, of Sacramento, Birney, Bost, Brown, Burns, Crank, Daggett, Edwards, Estee, Felton, Garrity, Gavigan, Geary, Gilmore, Hartshorn, Hoitt, Holden, Howard, Jackson, Keating, Kellogg, Laine, Mason, May, McCallion, McClure, McDonald, Mein, Noonan, O'Connor, Patterson, of San Joaquin, Pinder, Reddy, Streeter, Swift, Van Fleet, Warkins, Wason, of Mono, Young, and Mr. Speaker—39.

67 "Noes—Messrs. Alviso, Baker, of Yolo, Branch, Chandler, Colman, Cunningham, Del Valle, Fraser, Gay, Griffith, Hale, Hendrick, Henshaw, Jones, Leake, Leach, Lewis, Long, Matthews, of San Benito, McMurray, Murphy, Patterson, of Nevada, Paulk, Platt, Reynolds, Samuels, Sargent, Siebe, Wasson, of Ventura, Wentz, Wertsbaugher, Whipple, and Wood—32."

The following is a copy of the *original written journal* of the Assembly, deposited in the office of the secretary of State, showing the last action of the House on Senate bill No. 475:

CALIFORNIA LEGISLATIVE ASSEMBLY, TWENTY-FOURTH SESSION,
SENATE CHAMBER, Friday, *March* 4, 1881.

Consideration of Senate amendments to Assembly bill No. 475 resumed.

The question recurred on concurring therewith.

The ayes and noes were demanded by Messrs. Paulk, Sargent, and Wentz. Roll called. The House concurred in Senate amendments by the following vote:

Ayes—Arick, Baker, of Sacramento, Birney, Bost, Brown, Burns, Crank, Daggett, Estee, Edwards, Felton, Garrity, Gavigan, Geary, Gilmore, Hartson, Hoitt, Holden, Howard, Keating, Kellogg, Lane, Mason, May, McCallion, McClure, McDonald, Mein, Noonan, O'Connor, Patterson, of San Joaquin, Pinder, Reddy, Streeter, Swift, Van Fleet, Warkins, Wasson, of Mono, Young, and Mr. Speaker—39.

Noes—Alviso, Baker, of Yolo, Branch, Chandler, Coleman, Cunningham, Del Valle, Fraser, Gay, Griffith, Hale, Hendrick, Henshaw, Jones, Leach, Leake, Lewis, Long, Matthews, of San Benito, McMurray, Murphy, Patterson, of Nevada, Paulk, Platt, Reynolds, Samuels, Sargent, Siebe, Wentz, Wasson, of Ventura, Wertsbaugher, Whipple, and Wood—32.

Matthews, of Tehama, and Kilburn paired, Kilburn voting aye and Matthews no. Messrs. Cameron and Crumpton paired, Cameron aye, Crumpton no.

The following facts also appear from the journal:

Other business having intervened, "the consideration of Senate amendments to Assembly bill No. 475 resumed, the Speaker declaring that this was *not the final* action on the bill, and that the House had concurred in Senate amendments to Assembly bill No. 475 by a vote of 39 ayes to 32 noes. Mr. Paulk appealed from the decision of the Chair, on the ground that forty-one votes were required for concurrence. The question recurred, "Shall the decision of the Chair stand as the judgment of the House?"

After other business, on motion, the appeal was laid on the table by a vote of 38 ayes to 23 nays.

Mr. Hale then entered his protest against the decision of the Speaker on the ground that forty-one members voting in the affirmative are necessary to adopt the amendments, the vote on concurring in the amendments being the only action of the House thereon. Thereupon again: "The Speaker stated that the action on the Senate amendments to the bill *was not the final action* on the bill, and consequently a concurrence or non-concurrence in the amendments required a majority vote only."

Mr. Griffith and Mr. Kellogg then each entered his protest against the decision of the Speaker, declaring the Senate amendments concurred in, on the grouud that a concurrence required a majority of the whole House.

68 No other vote was had, or other announcement by the speaker made in regard to this bill. No other action was had by the House, except that on March 4, being the last act before adjournment *sine die*, the bill was reported as correctly enrolled, and as having been presented to the governor for approval. No action was taken on this report, and the bill does not appear to have been reported to the House as having been approved.

XXVI.

Mortgaged Lands, Mode and Manner of Assessment; Payment of Taxes.

The lands mentioned in the finding XXIV are not, and never have

been, in any way used in connection with the railroad business of the defendant, but are agricultural, grazing, and other lands, granted to said defendant under the acts of Congress hereinbefore mentioned for the purpose in said acts provided, and so far as patented are distributed in the respective counties in the following quantities: In Santa Clara county, 3,138 acres; San Benito county, 1,879 acres; Monterey county, 1,879 acres; Stanislaus county, 32,242 acres; Merced county, 20,655 acres; Fresno county, 18,789 acres; Tulare county, 260,315 acres; Kern county, 168,096 acres; Los Angeles county, 38,033 acres; San Bernardino county, 30,686 acres; San Diego county, 5,737 acres.

Said patented lands, and all of them, for each of the years 1880, 1881, and 1882, were assessed, including those situated in the county of Santa Clara, by the assessors of the respective counties in which they are situated, at their full cash values, and no deduction from said value was made or allowed on account of said mortgage or the indebtedness secured thereby; on the contrary, the laws of the State of California under which said assessors acted in making their assessments, prohibited any deduction from said values on account either of the mortgage or the indebtedness secured thereby.

In each of said years 1880, 1881, and 1882, the defendant paid in full, at the time the same became payable, all the taxes levied upon said lands for State, county, and municipal purposes, without any deduction on account of said mortgage.

XXVII.

The Whole of said Property Assessed by the State Board to the Defendant.

The State Board of Equalization in assessing said value of said property to and against defendant assessed the full cash value of said railroad, roadway, road-bed, rails, rolling-stock, and
69 franchises, without deducting therefrom the value of the mortgage or any part thereof, given and existing thereon as aforesaid to secure the indebtedness of said company to the holders of said bonds, notwithstanding they had full knowlege of the existence of the said mortgage; and, in making said assessment, the said State Board of Equalization did not consider or treat said mortgage as an interest in said property, but assessed the whole value thereof to the defendant in the same manner as if there had been no mortgage thereon.

XXVIII.

Other Corporations of Various Kinds.

At, before, and ever since the adoption of the constitution of California, now in force, there were and are existing under the laws of said State corporations of various kinds formed for the purpose and actually operating and doing business, and holding and using property in more than one county in said State. Corporations in

the said State of California now are, and ever have been, formed under general laws relating thereto, and there have ever existed, corporations formed under its said laws for fire, marine, mutual life, health, and accident insurance, building ferries, constructing and operating roads, wagon-roads, telegraphs, bridges, wharves, chutes and piers, and for constructing and operating canals, for the purpose of acquiring lands in large tracts, and distributing them as homesteads among the corporators for savings and loans, for mining, for the sale and distribution of water in the cities and towns, for manufacturing, mechanical, and agricultural purposes; for benevolent, charitable, and educational purposes; cemeteries, agricultural fairs, and various other purposes.

There is now, and for more than three years last past has been a railroad, in use and operation, extending from the city of Marysville, in the county of Yuba, to the town of Oroville, in the county of Butte, in said State, a distance of 26½ miles, which said road now is, and ever has been operated in more than one county in this State, and has the same gauge as the road of this defendant, and has ever been operated in like manner, and for like uses and purposes, and is now, and for more than two and a half years last past has been, in the ownership and under the operation and control of one N. D. Rideout, a citizen of the United States, and resident of the State of California.

70

XXIX.

Rules of Equality as Regards the System Adoped by said Board.

The State Board of Equalization, in making the supposed assessment of said roadway of defendant, did knowingly and designedly include in the valuation of said roadway the value of fences erected upon the line between said roadway and the land of coterminous proprietors. Said fences were valued at $300 per mile.

XXX.

The Legislature of the State of California, on the 27th day of March, A. D. 1862, passed an act entitled "An act to provide for the construction of a railroad from Mokelumne City to Woodbridge, in the county of San Joaquin," which act is found in the statutes of California for 1862, at page 97, and is hereby made a part of this finding.

On the 29th day of March, A. D. 1878, the Legislature of the State of California passed an act entitled "An act to provide for the construction of a railroad from the town of Truckee, Nevada county, to Tahoe City, Lake Bigler, in Placer county, and to regulate fares and freights thereon," which act is found in the statutes of California for 1877–'8, at page 698 *et seq.*, and is hereby made a part of this finding.

At the same session said Legislature passed another act on the 30th day of March, A. D. 1878, entitled "An act to provide for the

construction of a railroad from Ione, in the county of Amador, to a point in or near the towns of Sutter Creek or Jackson, in said county, and to regulate fares and freights thereon," which act is found in the same volume of said statutes of California, at page 841 *et seq.*, and is hereby referred to and made a part of this finding.

Numerous other acts of a similar charcter are found scattered through the annual volumes of the statutes of California. It does not appear from the evidence whether said acts have been acted upon by the grantees therein named or not.

XXXI.

The California Northern railway is a railway having the standard gauge of four feet eight inches and a half—being the same gauge as that of the Southern Pacific railroad of California—extending from Marysville, in Yuba county, to Oroville, in Butte county, a distance of twenty-six and one-half miles, twelve and one-half miles being in Yuba and fourteen in Butte county,
71 built and formerly owned and operated by the California Northern Railway Company, a corporation organized under the laws of California. On the 30th day of July, A. D. 1881, the said railway was sold under a decree of foreclosure of mortgage upon said road, and at said sale purchased by N. D. Rideout, a natural person, who received a conveyance thereof, in pursuance of said sale, went into possession thereof, and has ever since—being about two years and a half—possessed and operated, and he is now possessed of and operating said railway, claiming to be the owner thereof under said decree of foreclosure and sale, and since said sale said railway has been assessed, or purported to be assessed to, and the taxes claimed to have been levied thereon have been paid by said Rideout.

XXXII.

The road way occupied by the defendant, varies in width from thirty feet to two hundred feet on the northern division, which division embraces the portion of said railroad situate in the county of Santa Clara, and is a little over one hundred and sixty miles in length.

XXXIII.

That the northern division of said Southern Pacific Railroad is operated by said corporation as a separate railway. It has no physical connection with the southern division thereof by any constructed road forming a part of said road. It is separated therefrom by the coast range of mountains. The nearest point at which the railway of the northern division approaches that of the southern is over eighty miles. No passengers or freight are carried from one division to the other, except upon the section of the Central Pacific railroad which connects the two divisions by way of Lathrop and

Niles and San Francisco, a division of two hundred and fifty miles in length. The corporation requested the Board of Equalization to assess each division of said railway separately. In pursuance of said request, said board did so.

The northern division of the Southern Pacific railroad runs through the counties of San Francisco, San Mateo, Santa Clara, San Benito, Monterey, and Santa Cruz.

Neither said tax, nor any part thereof, has been paid.

XXXIV.

There was no testimony or facts in the case other than as appears in these findings, to countervail the effect or legal operation of any of the documents stated in these findings.

Conclusions of Law.

From the foregoing facts, the court finds as a conclusion of law that the defendants are entitled to judgment in their favor, with costs.

(Signed) FIELD, *Circuit Justice.*
(Signed) SAWYER, *Circuit Judge.*

72 Endorsed: Filed October 20, 1883. L. S. B. Sawyer, clerk.

73 *Judgment.*

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of California.

THE COUNTY OF SANTA CLARA
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 3074.

This cause having come on regularly for trial on the 25th day of July, 1883, being a day in the July, 1883, term of said court before the court, sitting without a jury, a trial by jury having been waived by stipulation of the attorneys for the respective parties, duly filed with the clerk of said court, Hon. E. C. Marshall, Attorney General of the State of California, J. H. Campbell, Esq., District Attorney of Santa Clara county, appearing as attorneys, and D. M. Delmas, A. L. Rhodes, D. S. Terry, J. M. Lesser, and John
74 T. Carey, Esqs., as counsel for plaintiff, and H. S. Brown and T. J. Bergin, Esqs., as attorneys, and S. W. Sanderson and John Norton Pomeroy, Esqs., as counsel for defendant, and the trial having been proceeded with on the 26th and 27th days of said July, and upon the 1st, 2d, 3d, 7th, 8th, 9th, 10th, 14th, and 15th days of August of said term and year, and witnesses on the part of the plaintiff and of the defendant having been sworn and examined, and documentary evidence on behalf of the respective parties having been introduced, and the evidence being closed, the cause after

arguments of counsel having been submitted to the court for consideration and decision, and the court after due deliberation having filed its finding and ordered that judgment be entered in accordance therewith—

Now, therefore, by virtue of the law and the finding aforesaid, it is considered by the court that the county of Santa Clara,
75 plaintiff, take nothing by this action; that the Southern Pacific Railroad Company, defendant, go hereof without day, and that the said defendant recover from said plaintiff its costs in this behalf expended, taxed at ———.

Judgment entered October 20, 1883.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and seal of said circuit court, this 20th day of October, A. D. 1883.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Endorsed: Filed October 20, 1883. L. S. B. Sawyer, clerk.

76 *Clerk's Certificate.*

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of California.

COUNTY OF SANTA CLARA
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the thesein entitled action.

Witness my hand and the seal of said circuit court, this 20th day of October, A. D. 1883.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By ——— ———, *Deputy Clerk.*

Endorsed: Judgment roll. Filed Oct. 20th, 1883. L. S. B. Sawyer, clerk.

77 In the Circuit Court of the United States, Ninth Circuit. District of California.

THE COUNTY OF SANTA CLARA, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, Defendant.
} Notice of Motion to Strike Out.

To CREED HAYMOND, S. W. SANDERSON, J. B. LAMAR,
Attorneys for Defendant:

You will please take notice that on the 16th day of July, 1883, at

the court-room of the above entitled court, in Appraiser's Building, city and county of San Francisco, State of California, at the opening of court on said day, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, we shall move the said court to strike out from the answer heretofore served and filed in the above entitled action, all those certain portions, paragraphs, and parts of said answer designated and specified as follows, to wit:

I.

So much of paragraph I of said answer commencing with the word "denies," line fifteen, and ending with the word "out," line nineteen page one, on the ground that the same is sham, irrelevant, and evasive.

II.

Out of paragraph II, from line four, commencing with the word "the," and ending with the word "California," line ten, page two, on the ground that the same is sham, irrelevant, and immaterial.

III.

All of paragraph III of said answer, on the ground that the same is sham, irrelevant, and immaterial.

IV.

All of paragraph V of said answer, on the ground that the same is sham, irrelevant, and immaterial.

V.

All of paragraph VI of said answer, on the ground that the same is sham, irrelevant, and immaterial.

VI.

All of paragraph VII of said answer, on the ground that the same is sham, irrelevant, and immaterial.

VII.

All of paragraph VIII of said answer, on the ground that the same is sham, irrelevant, and immaterial.

VIII.

All of paragraph IX of said answer, on the ground that the same is sham, irrelevant, and immaterial.

IX.

All of paragraph X of said answer, on the ground that the same is sham, irrelevant, and immaterial.

X.

All of paragraph XI of said answer, on the ground that the same is sham, irrelevant, and immaterial.

XI.

All of paragraph XII of said answer, on the ground that the same is sham, irrelevant, and immaterial.

XII.

All of paragraph XIII of said answer, on the ground that the same is sham, irrelevant, and immaterial.

XIII.

All of paragraph XV of said answer, on the ground that the same is sham, irrelevant, and immaterial.

XIV.

From page five, of said answer, the pasted addition thereto, on the ground that the same is sham, irrelevant, immaterial, and redundant.

XV.

All of paragraph XX of said answer, on the ground that the same is sham, irrelevant, and redundant.

XVI.

All of paragraph XXI of said answer, on the ground that the same is sham, irrelevant, and redundant.

XVII.

All of paragraph XXII of said answer, on the ground that the same is sham, irrelevant, and redundant, and a statement of a conclusion of law.

XVIII.

All of paragraph XXIII of said answer, on the ground that the same is sham, irrelevant, and redundant.

XIX.

All of paragraph XXIV of said answer, on the ground that the same is sham, irrelevant, and redundant.

XX.

All of paragraph XXV of said answer, on the ground that the same is sham, irrelevant, and redundant.

XXI.

All of paragraph XXVI of said answer, on the ground that the same is sham, irrelevant, and redundant.

XXII.

All of paragraph XXVII of said answer, on the ground that the same is sham, irrelevant, and redundant.

XXIII.

All of paragraph XXVIII, beginning with the word "and," line twenty-three, to end of said paragraph, on the ground that the same is sham, irrelevant, and redundant.

XXIV.

All of paragraph XXIX of said answer, on the ground that the same is sham, irrelevant and redundant.

XXV.

All of paragraph XXX of said answer, on the ground that the same is sham, irrelevant, and immaterial.

XXVI.

All of paragraph XXXI of said answer, on the ground that the same is sham, irrelevant, and redundant.

XXVII.

All of paragraph XXXII of said answer, on the ground that the same is sham, irrelevant, and redundant.

XXVIII.

All of paragraph XXXIII of said answer, on the ground that the same is sham, irrelevant, and redundant.

XXIX.

All of paragraph XXXIV of same answer, on the ground that the same is sham, irrelevaut, and redundant.

XXX.

From paragraph XXXVI, beginning with the word "and," line 34, to and including word "California," line 38, as sham, irrelevant, and redundant.

XXXI.

All of paragraph XXXIX of said answer, on the ground that the same is sham, irrelevant, and redundant.

Said motion will be made on the various grounds hereinbefore specified, and we shall use, on the hearing of this motion, all the papers and pleadings on file herein.

J. H. CAMPBELL,
District Attorney of —— County,
E. C. MARSHALL,
Attorney-General of the State of California,
Attorneys for Plaintiff.
D. S. TERRY,
J. M. LESSER,
JOHN T. CAREY,
Of Counsel.

80 Endorsed: Service of the within notice of motion to strike out admitted this 14 day of July, A. D. 1883.
S. W. SANDERSON & CREED HAYMOND.

Filed 14th day of July, 1883.
L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy.*

81 *Order Denying Motion to Remand.*

At a stated term, to wit: the July term A. D. 1883, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court room, in the city and county of San Francisco, on Monday, the 16th day of July, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Stephen J. Field, Associate Justice of the Supreme Court of the United States. The Honorable Lorenzo Sawyer, circuit judge.

THE COUNTY OF SANTA CLARA
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 3074.

On this day the motion of the plaintiff to remand this cause back to the State court of California, came on regularly to be heard, and was argued by counsel for the respective parties, and now the court being fully advised, denies said motion.

To which ruling of the court the plaintiff excepted.

82 *Order that H. S. Brown, Esq., be Attorney of Record.*

At a stated term, to wit: the July term, A. D. 1883, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court room, in the city and county of San Francisco, on Thursday, the 19th day of July, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Stephen J. Field, Associate Justice of the Supreme Court of the United States. The Honorable Lorenzo Sawyer, circuit judge.

THE COUNTY OF SANTA CLARA
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 3074.

On motion of Harvey S. Brown, Esq., it is ordered that his name be entered as attorney of record in all the "Railroad Tax Cases," now pending in this court, in addition to the other attorneys of record.

The motion heretofore argued and submitted to strike portions of the answer herein, having been duly considered, it is ordered that

so much of the said answer as is contained in the articles numbered 22, 34, 35, 36, 37 and 39, and that portion of article 15, contained on the printed slip, being the last paragraph of the article, and the third paragraph of article 26, and all of article 28, after the first two paragraphs, be stricken out as being matters of evidence or immaterial matter. In other particulars the motion is denied. To this order the defendant excepts, and to the refusal of the court to strike out other matter the plaintiff excepts.

83 *Opinion.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

For taxes of 1882.

COUNTY OF SANTA CLARA
vs.
SOUTHERN PACIFIC RAILROAD CO. } No. 3074.

For taxes of 1882.

COUNTY OF SACRAMENTO
vs.
CENTRAL PACIFIC RAILROAD CO. } No. 3019.

For taxes of 1882.

COUNTY OF SACRAMENTO
vs.
CENTRAL PACIFIC RAILROAD CO. } No. 3099.

For taxes of 1881.

PEOPLE OF THE STATE OF CALIFORNIA
vs.
NORTHERN PACIFIC RAILWAY CO. } No. 2805.

For taxes of 1881.

PEOPLE OF THE STATE OF CALIFORNIA
vs.
CENTRAL PACIFIC RAILROAD CO. } No. 2845.

For taxes for 1881.

PEOPLE OF THE STATE OF CALIFORNIA
vs.
SOUTHERN PACIFIC RAILROAD CO. } No. 2846.

84 1. The property and franchises of the Southern Pacific Railroad Company and of the Central Pacific Railroad Company, corporations created under the laws of California, though the companies are employed by the General Government for postal and military purposes, and were aided by land grants

and loans in the construction of their roads, are not exempt from State taxation in the absence of Congressional legislation declaring such exemption. It is competent for Congress to exempt any agencies it may employ for service to the General Government from such taxation as will, in its judgment, impede or prevent their performance.

2. The Fourteenth Amendment of the Constitution, in declaring that no State shall deny to any person within its jurisdiction the "equal protection of the laws," impose a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among them that of taxation.
3. The "equal protection of the laws" to any one implies not only that the means for the security of his private rights shall be accessible to him on the same terms with others, but also that he shall be exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of any kind, and among them that of unequal taxation.
4. Uniformity in taxation requires uniformity in the mode of assessment, as well as in the rate of percentage charged.
5. The thirteenth article of the constitution of California declares that "a mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby," and that "except as to railroad and other *quasi* public corporations," the value of the property affected, less the value of the security, shall be assessed and taxed to its owner, and that the value of the security shall be assessed and taxed to its owner; and that the taxes so levied shall be a lien upon the property and security, and may be paid by either party to the security; that if paid by the owner of the security, the tax levied upon the property affected thereby shall become a part of the debt secured; and if the owner of the property shall pay the tax levied on the security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof. In the assessment of property of the defendants—railroad companies—the mortgages thereon were not deducted, but the whole value of the property, nothwithstanding the mortgages thereon, was assessed and the property taxed according to such assessment, to those companies; *Held* (1), treating the mortgages as transferring a taxable interest in the property, that in assessing against the company the interests with which they had at the time parted by their mortgages, and taxing them upon that assessment, was a proceeding to take the property of the companies without due process of law; and (2) treating the mortgages as a lien or incumberance upon the property, that by not deducting their amount in the assessment of the value of the property of the railroad companies for taxation, as is done

in the valuation of property of natural persons, when subject to a mortgage, there was a discrimination against the companies, which resulted in imposing a greater burden upon their property than is imposed upon the property of natural persons.

6. Persons do not loose their right to equal protection guaranteed by the Fourteenth Amendment to the Federal Constitution when they associate themselves into a corporation under the laws of California.

7. The State possesses no power to withdraw corporations from the guaranties of the Federal Constitution. Whatever property a corporation lawfully acquires is held under the same guaranties which protect the property of natural persons from spoliation.

8. Under the reserved power to amend, alter, or repeal the law under which private corporations are formed, the State cannot exercise any control over the property of a corporation, except such as may be exercised through control over its franchise, and over like property of natural persons engaged in similar business.

85 9. The proceeding for the assessment of property—that is, the ascertainment of its value upon evidence taken—is judicial in its character, and to its validity the law authorizing it must provide some kind of notice, and the opportunity to be heard respecting it, before the proceeding becomes final, or it will want the essential ingredient of due process of law. The notice may be given by personal citation or by statute. It is usually given by a statute prescribing a time and place where parties may be heard before boards appointed for the correction of errors in assessment.

10. The constitution of California (section 15, article iv) provides that "on the final passage of all bills they shall be read at length, and the vote shall be by yeas and nays upon each bill separately, and shall be entered on the journal, and no bill shall become a law without the concurrence of a majority of the members elected to each house." Under this provision, the court, to inform itself, will look to the journals of the Legislature, and if it appears therefrom that the bill did not pass by the constitutional majority, then it will not be regarded as a law.

11. The journals of the Legislature show that the act of March 14, 1881, mentioned in the opinion, never became a law.

12. Where the original written journals on file in the office of the secretary of State differ in any material particular from the printed journals, the original written journals are the authentic official records, and must control.

FIELD, Circuit Justice:

These are actions for the recovery of unpaid State and county taxes levied upon certain property of the several defendants, either for the fiscal year of 1881 or of 1882, and alleged to be due to the

plaintiffs with an additional five per cent. as a penalty for their non-payment, and interest. The defendants are corporations formed under the laws of California, and the taxes claimed were levied on the franchise, roadway, road-bed, rails, and rolling-stock of each of them as a unit, without separation or distinction in the valuation of the different parts composing the whole. To two of the corporations, the Southern Pacific and the Central Pacific, privileges and powers other than those acquired under the laws of the State were conferred by grant of the General Government, and for them obligations and burdens were assumed not contemplated or possible under their original organization.

It is contended that Congress has selected these corporations as the special agents and instruments of the nation for public purposes, and to that end has clothed them with faculties, powers, and
86 privileges to enable them to construct and maintain their roads as postal and military roads of the Government: that the State by the act of its Legislature has assented to the acceptance of these faculties, powers, and privileges, and that the companies in consideration of them have assumed obligations to the General Government with the discharge of which the State cannot interfere; that the power to tax the franchises of the companies involves the power to destroy the corporations, and thus deprive the General Government of the benefits of the roads, for the construction and maintenance of which its grants were made; that the existence and exercise of the power on the part of the State is therefore incompatible with the duties devolved upon and assumed by the companies to the United States. Hence it is claimed by counsel that the tax levied upon the franchises of the defendants is illegal and void; and reference is made by them to numerous decisions of the Supreme Court holding in general language that an agency of the United States, an instrumentality by which the Federal Government discharges its obligations to the people of the country, cannot be taxed by any State or subordinate authority. Certainly no State can impede and embarrass the Federal Government in its operations, as might be done if it could impose a tax upon the necessary means adopted for their execution; nor can the Federal Government any more impede and embarrass the operations of the State governments, as it might do if it could impose a tax upon the necessary means adopted by them in the exercise of their powers.

The two governments have supreme authority within their own spheres, and within them cannot be interfered with by the other. On this principle it was held by the Supreme Court that the State could not levy a tax upon the salary or emoluments of an officer of the United States; nor could the United States impose a tax upon the salary of a State judge, (Dobbins *vs.* Commissioners of Erie County, 16 Peters, 435; Collector *vs.* Day, 11 Wall., 113.)
87 Both officers were necessary agents, instrumentalities for exercising the powers of their respective governments, and to strike at the salary of either was to strike down the means by

which he could exist and maintain his office. In both cases, as observed by Mr. Justice Nelson, the exemption from taxation was "upheld by the great law of self-preservation, as any government whose means employed in conducting its operations is subject to the control of another can exist only at the mercy of that government."

The correctness of this general principle is not controverted, and could not be in the face of the numerous decisions of the Supreme Court, when applied to the means or instrumentalities created by the Federal Government, or existing under its laws for the exercise of its powers, such as officers of its courts in the administration of justice, or fiscal agents in the collection, custody, or distribution of its funds. But we are unable to accede to the position that every agent or instrument owing its existence to the State, which the United States may see fit to employ, is thus exempted from the common burdens of the State in which it may be found or used, in the absence of specific Congressional legislation declaring such exemption. The coach employed to carry the mail, or the ferry-boat to transfer it across a navigable stream, would hardly, from their employment alone as instrumentalities of the General Government, be withdrawn from the taxing power of the State. As well observed by Chief Justice Chase, with reference to the exemption from State taxation claimed by the Kansas Division of the Pacific Railroad Company for its property, no limits can be perceived to the principle of exemption which the companies thus seek to establish. "Every corporation," he added, "engaged in the transportation of mails, or of Government property of any description, by land or water, or in supplying materials for the use of the Government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now
88 held by such corporations, and having relations more or less direct to the National Government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to State taxation, if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the State governments." (Thomson *vs.* Pacific Railroad, 9 Wall., 579, 591.)

It is true, in the case from which this citation is made, exemption from taxation was only claimed for the property, the road and rolling-stock of the company. Here the exemption claimed is of the franchises of the corporations, their right to exist and maintain their roads. But it is not perceived that this difference between the cases can affect the rule which was there laid down, that unless Congress interposes and creates the exemption, the taxing power of the State is not restrained; for if the roads and rolling-stock can be taxed, and, if the taxes are not paid, can be sold, the ability of the companies to discharge their obligations as agents of the Government, would be as effectually destroyed, as by the taxation

and sale of the franchises. The possession of the roads and rolling-stock is as essential as the possession of the franchises.

The objection presented by counsel is not free from difficulty. At one time I was persuaded that it was tenable, and so expressed myself by joining in the dissent in Railroad Company *vs.* Peniston, reported in 18 Wallace; but on further consideration I have come to the conclusion that the rule laid down in the *Thomson Case* is the true and sound rule. The State, it is conceded, cannot use its taxing power so as to defeat or burden the operation of the General Government. And where that Government has itself created the instrumentality used, its exemption from State taxation necessarily follows. But we are of opinion, following the decision cited that, where the instrumentality is the creation of the State, and
89 is employed or adopted by the General Government for its convenient use, though additional privileges and benefits are conferred by that government to enlarge that use, the instrumentality remains subject to the taxing power of the State, unless Congress declares it to be exempt from such power. Congress can undoubtedly exempt any agencies it may employ for services to the general government from such taxation as will, in its judgment, impede or prevent their performance. Occasions may arise hereafter, especially in time of war, where the necessities of the Federal Government will require such exemption of the roads of the companies and of their franchises and appurtenances to be declared and enforced, the exemption to continue until the necessities calling for it shall cease. But as yet Congress has not declared any such exemption either of their property or of their franchises, and we therefore think that none exists.

Of the other defenses interposed to the claim of the plaintiffs, some are founded upon an alleged neglect of the assessing officers to comply with requirements of the laws of the State, and some are founded upon the alleged conflict of provisions of the State constitution, under which they acted, with requirements of the Federal constitution. Of the former are objections to what is termed the lumping character of the assessment, that is the blending of the different items composing the whole into one valuation, namely, the value of the franchise, road-way, road-bed, rails, and rolling stock, without any designation of the value of each distinct part; and to the including in the roadway of property not properly appertaining to it, such as fences on its sides belonging to adjoining proprietors, and so far as the roadway of the Central Pacific company is concerned, to the including in the estimate of its length the four miles of the bay between the road in the county of San Francisco and the wharf in Alameda county. The value of the fences is included in the valuation of the roadway of each company. The distance across
90 the bay of San Francisco is added to the length of the road assessed to the Central Pacific Company, and is assessed as of equal value per mile with the rest of the road. It is also contended that the land composing the roadway, and the rails laid

thereon, should have been separately assessed, the latter as improvements under the constitution of the State, which requires "land and improvements thereon" to be separately assessed. An objection is also taken to those cases in which the people of the State are plaintiffs, that the statute under which they were brought was repealed in 1880, and that after that period actions for unpaid taxes could only be brought in the name of the county. We do not, however, deem it important to pass upon these and other objections to the assessment, arising upon an alleged disregard of the laws of the State. We shall confine ourselves in what we have to say to the defenses made to the assessment and tax from the alleged conflict of the provisions, under which they were levied, to requirements of the Fourteenth Amendment to the Constitution of the United States, which declares that "no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The railroad companies contend that both provisions of this amendment were violated in the assessment and taxation of their property.

The constitution of California provides for taxes on property, on incomes, and on polls. The taxation on property, with which we are alone concerned in this case, is to be in proportion to its value. There is no provision for taxing any article or kind of property specifically. It declares that all property, not exempt under the laws of the United States, shall, with some exceptions, be taxed according to its value, to be ascertained as prescribed by law, and that the word "property" shall "include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

91 It also declares that "a mortgage, deed of trust, contract, or other obligation by which a debt is secured *shall for the purposes of assessment and taxation be deemed and treated as an interest in the property affected thereby.*" And that "*except as to railroad and other quasi public corporations*, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof." It also provides that "the taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof."

By the constitution not only is the *ad valorem* rule established for the taxation of property, but provision is also made for its assessment. The franchise, roadway, roadbed, rails and rolling-stock of railroads operated in more than one county are to be assessed by

a special board termed the State Board of Equalization. All other property is to be assessed in the county in which it is situated. The supervisors of each county are constituted a Board of Equalization of such taxable property, and must act upon prescribed rules of notice to its owners. The State Board is authorized to act not only as assessors of the franchise, roadway, roadbed, rails and rolling-stock of railroads mentioned, but as a Board of Equalization of the taxable property of the several counties, so that equality may be secured between the tax-payers of different localities. Its action in this latter character must also be upon prescribed rules of notice. But though the officers by whom the assessment of these properties is to be made are different, the properties are subject to the
92 same rule of taxation; that is, they are to be taxed in proportion to their value. In fixing, however, the liabilities of parties to pay the tax assessed and levied upon properties subject to a mortgage, and in estimating the value of such properties as the foundation for the tax, a discrimination is made between that held by railroad and *quasi* public corporations and that held by natural persons and other corporations. A mortgage, as seen by the provisions of the constitution quoted above, is deemed and treated for the purposes of assessment and taxation as an interest in the property affected. At common law a mortgage of property is a conveyance of the title subject to a condition that, if the debt secured be paid as stipulated, the conveyance is to become inoperative. Until paid, the title is in the mortgagee. By the constitution, a mortgage for the purpose of assessment and taxation operates in like manner to transfer the mortgagor's interest to the extent represented by the amount secured. If such amount be half the value of the property, the taxable interest of the mortgagee is an undivided half interest in the property. If the amount equal or exceed the whole value of the property, the taxable interest of the mortgagee embraces the whole property. The value of the security can never exceed the value of the property mortgaged; it may be less, and is less if the amount secured be less than such value.

Now, under the constitution, where, by the execution of a mortgage, a taxable interest in the property held by natural persons, or corporations other than railroad or *quasi public*, is transferred by the owner to another party, or the whole taxable interest is vested in him, the holder of such interest is alone taxed for it. It is assessed against him, as the owner of it, and against him alone could it be justly assessed. But if by a mortgage on the property of railroad or *quasi* public corporations, a taxable interest in such property is transferred by the corporation to another, or the whole in-
93 terest is vested in him, the holder of such interest is exempted from taxation for it, and the corporation is assessed and taxed for it notwithstanding the transfer. No account is taken of the transfer of the taxable interest in the estimate of the value of the property. It is still assessed and taxed to the original holder. The discrimination thus made will more clearly appear by an

illustration of the practical operation of the provisions. If, for example, A owning property worth $20,000 should execute a mortgage deed thereof to the Nevada Bank, in San Francisco, to secure $10,000, the bank would hold a taxable interest in that property to the amount of an undivided half. Its position for taxation would be precisely as though a simple conveyance of an undivided half interest had been made to it. And the constitution, as seen above, requires that each owner shall pay the tax on his separate interest, and if he pay the tax chargeable on the interest of the other, he shall be allowed for it, either by an addition to the mortgage debt, or a discharge of a portion of that debt according as he is the one or the other party to the security. No one would pretend that the mortgagor should pay without such allowance the tax chargeable to the bank, nor that the bank should pay the tax chargeable to the mortgagor, except upon like condition. It would be difficult to state any principle which would justify the exaction from one of a tax leviable on the interest of the other. No power in any State has ever been asserted going to that extent, except the power to confiscate. That exaction would not be the taking of property by due process of law, even upon the theories as to what constitutes such process asserted in this case. It would be sheer naked spoliation by force of arbitrary power.

If, however, a railroad corporation should execute its mortgage deed to the Nevada Bank to secure a loan equal to half or the whole of the value of its property, and thus transfer to the bank a
94 portion or the whole of its taxable interest in the property, that which is thus condemned as naked spoliation would be enforced, if effect be given to the constitution as it is written. The taxable interest in that case held by the bank would not be assessed nor taxed to the bank. If the mortgage should be for half of the value of the property, the railroad company would still have to pay the tax on the interest transferred, and would not be allowed any credit on the mortgage for the amount paid. If the mortgage should be equal to or exceed the whole value of the property, the railroad company, which would not then hold any taxable interest in the property—no more than if it had been previously transferred by an absolute conveyance—would still be required to pay the tax upon it; also without any credit for the payment. On what principle, or by what species of reasoning, a tax upon property can be upheld and assessed against a party, be the party a natural or an artificial person, when the taxable interest in it had, at the time of the levy of the tax, been transferred to another, I am at a loss to understand. This position of the case was suggested to counsel on more than one occasion during the argument, and no answer was made to it. To every other position an answer was attempted, but to this none, and, as we think for the best of reasons, because none was possible, unless indeed it be held that the constitution does not mean what in express language it declares, that a mortgage "*shall*,

for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby."

Under the provisions of the constitution cited, the property of the several railroad companies, defendants in these cases, was assessed and taxed, and in such assessment and taxation all the injurious discriminations mentioned were applied against the companies, as will appear by a statement of the proceedings taken. In considering them it will tend to clearness and brevity if we confine
95 what we have to say principally to the case of Santa Clara county against the Southern Pacific Railroad Company. The circumstances distinguishing the other cases from it do not affect the questions involved.

The Southern Pacific Railroad Company operates a railroad through several counties. The entire length of the road is somewhat over 711 miles, of which 59 miles and three-tenths of a mile pass through the county of Santa Clara. The principal place of business of the company is in the city of San Francisco. Its stockholders are citizens of the United States, some of whom reside in California, and some in other States. On the 1st of April, 1875, it was indebted to divers citizens of the United States in large sums of money, advanced towards the construction and equipment of its road, and to secure the indebtedness, and to complete the construction and equipment, it executed and delivered to certain parties, D. O. Mills, and Lloyd Tevis, of the city and county of San Francisco, a mortgage upon its road, its francises, rolling-stock, and appurtenances, and upon a large number of tracts of land, situated in different counties, aggregating over 11,000,000 acres, which were the property of the company. The indebtedness amounted to the sum of $46,000,000, and consisted of various bonds of the company. A portion of these bonds, amounting to about $1,000,000, have been paid, and so has the accruing interest on all of them. The balance of the bonds, amounting to about $45,000,000, remains a subsisting indebtedness. This mortgage was soon afterwards placed on record in the office of the recorder of deeds in the several counties of the State in which the property is situated.

The State Board of Equalization assessed the franchise, roadway, roadbed, rails, and rolling-stock of that portion of the road which is designated as its main branch, being 160.84 miles in length, at $2,412,600, making $15,000 a mile, and apportioned to the county of Santa Clara $889,500. Upon this amount thus asssesed and
96 apportioned, the taxes were levied for which the action of that county is brought. Another portion of the road, designated as the Southern division, was assessed in a similar manner, and the amount apportioned to the different counties through which the road passed. In making the assessment of the different portions, no deduction was allowed for the mortgage thereon. No account was taken of the mortgage; it was not treated as an interest in the property, or as affecting in any way the liability of the mortgagor for the tax. If a natural person had executed the mortgage, it being

for an amount exceeding the value of the property, the whole taxable interest would have been treated as in the mortgagees, and they alone would have been assessed and taxed; they alone would have been held amenable to a personal action for the taxes. If the mortgagor had paid the taxes to prevent a sale of the property, the amount paid would have been credited on the mortgage. It can hardly require any further illustration to show the discrimination against railroad companies in the matter of taxation, where property is subject to a mortgage. Not only in such a case is the company taxed for interests it does not possess, but it is refused any credit by those who do possess the interests for the payment exacted.

The same discrimination will appear against railroad companies in the taxation of their property, if we treat mortgages thereon—not as the Constitution declares they shall be treated—as *interests* in the property, but as mere liens or incumbrances thereon. The basis of all *ad valorem* taxation is necessarily the assessment of the property, that is, the estimate of its value. Whatever affects the value, necessarily proportionately increases or diminishes the tax. If, therefore, any element which is taken into consideration in the valuation of the property of one party be omitted in the valuation of the property of another, a discrimination is made against one and in favor of the other, which destroys the uniformity so essential to all just and equal taxation. Such an element exists where in the assessment of property subject to a
97 mortgage, the value of the mortgage is deducted if the property be owned by a natural person, and is not deducted if owned by a railroad corporation. And the constitution of the State declares that in the ascertainment of values as the basis of taxation such deduction shall be allowed in the one case and denied in the other. Instances of every-day occurrence will show the effect of this discrimination in a clear light. A natural person and a railroad company own together a parcel of property in equal proportions subject to a mortgage. In estimating the value of the undivided half belonging to the natural person, half of the amount of the mortgage is deducted. In estimating the value of the undivided half belonging to the railroad company, no part of the mortgage is deducted. The discrimination is made against the company for no other reason than its ownership. Take another instance: a natural person and a railroad company own tracts of land adjoining each other, of the same quantity and of similar fertility and richness, both being subject to a mortgage. In the estimate of the value of the property belonging to the natural person the amount of the mortgage is deducted; in the estimate of the value of the property belonging to the railroad company the mortgage is not deducted. Of course, the valuation of the latter, and consequent tax is proportionately increased, and this discrimination is made solely because of the ownership of the property. Should these two owners exchange their lands, the valuations made upon them would change with the ownership. Should the railroad company sell its parcel to

an individual, the assessing officers would at once be bound to return a different valuation of the property as a basis for taxation. Every one sees that the valuation has not in fact changed with the ownership, and, therefore, that the discrimination is made purely because a rule is adopted in the assessment of the property of one party different from that applied in the assessment of the
98 property of the other, purely on account of its ownership. A corresponding difference in the tax which the different owners must pay follows the assessment. Thus, if two adjoining parcels are each subject to a mortgage for half its value, the natural person owning one of them pays a tax on the other half, while the corporation will pay a tax on the whole of its tract, that is double the tax of the individual. Thus, if each tract be worth $100,000, subject to a mortgage of $50,000, and the rate of taxation be two per cent., the tax of the individual will be $1,000; the tax of the corporation will be $2,000. If, then, these owners should exchange their lands, the property which this year is thus taxed at $1,000, will next year be taxed at double the amount, and the other parcel this year taxed at $2,000, will be taxed at one half of that sum. The property which before was half exempt is now subject to taxation to its full value; and that which before was taxable at its full value is now half exempt, and all this change in valuation without any change in the character or use of the property, but solely on account of its new ownership.

The principle which sanctions the elimination of one element in assessing the value of property held by one party, and takes it into consideration when assessing the value of property held by another party, would sanction the assessment of the property of one at less than its value—at half or quarter of it—and that of another at more than its value—at double or treble of it—according to the will or caprice of the State. To-day railroad companies are under its ban, and the discrimination is against their property. To-morrow it may be that other institutions will incur its displeasure. If the property of railroad companies may be thus sought out and subjected to discriminating taxation, so, at the will of the State upon a change of its constitution, may the property of churches, of universities, of asylums, of savings banks, of insurance companies, of
99 rolling and flouring mill companies, of mining companies, indeed of any corporate companies existing in the State. The principle which justifies such a discrimination in the assessment and taxation of property on the ground of its ownership, where one of the owners is a railroad corporation and the other a natural person, would also sustain the discrimination where both owners are natural persons. A mere change in the State constitution would effect this if the Federal Constitution does not forbid the discrimination. Any difference between the owners, whether of age, color, or race, or sex, which the State might designate, would be sufficient reason for the discrimation. It would be a singular comment upon the weakness and defect of our republican institutions if the valuation

and consequent taxation of property could vary according as the owner is white, or black, or yellow, or old, or young, or male, or female. A classification of values for taxation upon any such ground would be abhorrent to all notions of equality of right among men. Strangely indeed would the law sound if it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or old men, and not deducted if owned by black men or young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not deducted if owned by churches or universities, and so on, making a discrimination whenever there was any difference in the character, or pursuit, or condition of the owner. To levy taxes on a valuation of property thus made is of the very essence of tyranny, and has never been done except by bad governments in evil times, exercising arbitrary and despotic power.

100 Until the adoption of the Fourteenth Amendment there was no restraint to be found in the Constitution of the United States against the exercise of such power by the States. In many particulars the States were previously limited; their sovereignty was a restricted one. They could not declare war, nor make treaties of peace. They could not enter into compacts with each other. They could pass no bill of attainder, or an *ex post facto* law, or a law impairing the obligation of contracts. They could not interfere with the exercise of the powers nor obstruct the laws of the Federal Government. But in many other particulars the power of the States was supreme, subject to no control by the Constitution of the United States. The original amendments were only limitations upon the Federal Government, and did not affect the States Among the powers still held by the States was the power of taxation. When not interfering with any power or purpose or agent of the Federal Government, there was no limitation upon its exercise. Except as restrained by their own constitutions, the States might impose taxes upon any property within their jurisdiction, and, as said in the Delaware Tax case, (18 Wall., 241,) the manner in which its value was assessed and the rate of taxation, however arbitrary or capricious, were mere matters of legislative discretion; and it was not for the court to suggest in any case, as there observed, that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State.

The first section of the Fourteenth Amendment places a limit upon all the powers of the State, including among others that of taxation. After stating that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside, it de-

clares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the
101 United States; nor shall any State deprive any *person* (dropping the designation citizen) of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws. The amendment was adopted soon after the close of the civil war, and undoubtedly had its origin in a purpose to secure the newly made citizens in the full enjoyment of their freedom. But it is in no respect limited in its operation to them. It is universal in its application, extending its protective force over all men of every race and color, within the jurisdiction of the States througout the broad domain of the Republic. A constitutional provision is not to be restricted in its application because originally suggested to prevent an existing wrong. Such a restricted interpretation was urged in the *Dartmouth College Case*, to prevent the application of the provision prohibiting legislation by States impairing the obligation of contracts to the charter of the college, it being contended that the charter was not such a contract as the prohibition contemplated. But Chief Justice Marshall, after observing that it was more than possible that the preservation of rights of that description was not particularly in view of the framers of the constitution, when that clause was introduced, said: "It is not enough to say, that this particular case was not in the mind of the convention when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception." (4 Whea., 494.) All history shows that a particular grievance suffered by an individual or a class, from a defect-
102 ive or oppressive law or the absence of any law touching the matter, is often the occasion and cause for enactments, constitutional or legislative, general in their character, designed not merely to cover cases of the same, but all cases of a similar nature. The wrongs which were supposed to be inflicted upon or threatened to citizens of the enfranchised race, by special legislation directed against them, moved the framers of the amendment to place in the fundamental law of the nation provisions not merely for the security of those citizens, but to insure all men, at all times and at all places, due process of law, and the equal protection of the laws. Oppression of the person and spoliation of property by any State were thus forbidden, and equality before the law was secured to all. In the argument of the San Mateo Case in the Supreme Court, Mr. Edmunds, who was a member of the Senate when the amendment was discussed and adopted by that body, speaking of its broad and

catholic spirit, said: "There is no word in it that did not undergo the completed scrutiny. There is no word in it that was not scanned, and intended to mean the full and beneficial thing that it seems to mean. There was no discussion omitted: there was no conceivable posture of affairs to the people who had it in hand," which was not considered. And the purpose of this long and anxious consideration, was that protection against injustice and oppression, should be made forever secure—to use his language—"secure, not according to the passion of Vermont, or of Rhode Island, or of California, depending upon their local tribunals for its efficient exercise—but secure as the right of a Roman was secure, in every province and in every place, and secure by the judicial power, the legislative power, and the executive power of the whole body of the States and the whole body of the people."

With the adoption of the amendment the power of the States to oppress any one under any pretense or in any form was for-
103 ever ended, and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights—in his right to life, to liberty, to property, and to pursue his happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This protection attends every one everywhere, whatever his position in society or his association with others, either for profit, improvement, or pleasure. It does not leave him because of any social or official position which he may hold, or because he may belong to a political body or a religious society, or be a member of a commercial, manufacturing, or transportation company. It is the shield which the arm of our blessed Government holds at all times over every one—man, woman, and child—in all its broad domain, wherever they may go and in whatever relations they may be placed. No State—such is the sovereign command of the whole people of the United States—no State shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law; and no State, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the laws.

Unequal taxation, so far as the same can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly is, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in its purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not thus devised, yet necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it

104 will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed at the perpetration of injustice and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation leveled against special classes has been the fruitful means of oppressions, and the cause of more commotions and disturbances in society, of insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel in the San Mateo case ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read as contended it does in law—"No State shall deprive any person of his property without due process of law, *except* it be in the form of taxation—nor deny to any person within its jurisdiction the equal protection of the laws, except it be in the form of taxation." No such limitation can thus be engrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power to deprive by taxation the equal protection of the laws.

Soon after the adoption of the amendment Congress recognized by its legislation the application of the prohibition to unequal taxation. The original civil rights act, previously passed, made persons of the emancipated race citizens, and declared that all citizens of the United States of every race or color should have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, and give evidence; to inherit, purchase, lease, sell, own, and convey real and personal property, and to the benefit of all laws and proceedings for the security of persons and property, as was enjoyed by white citizens, and should be subject to like punishments, pains and penalties, and to none other. After the adoption of the amendment the act was re-enacted, and to the clause that all persons should enjoy
105 the same rights as white citizens, and be subject to like punishments, pains, and penalties, it added and subject only to like "taxes, licenses, and exactions of every kind and to no other." The Congress which re-enacted the civil rights act with this addition was largely composed of those who had voted for the amendment; and it is a matter of record that oppressions by unequal taxation were the subject of consideration before the committee of the two houses under whose direction the amendment was proposed. But were this otherwise, and the wrong of such unequal taxation was not prominently in the minds of the framers, it being within the language of the prohibition, must be held to be within its operations. As most truly and eloquently said by Mr. Conkling, in the argument of the San Mateo case: "If it be true that new needs have come, if it be true that wrongs have arisen, or shall arise, which the framers in their forebodings never saw—wrongs which shall be righted by the words they established; then all the more

will those words be sanctified and consecrated to humanity and progress."

The fact to which counsel allude, that certain property is often exempted from taxation by the States, does not at all militate against this view of the operation of the Fourteenth Amendment in forbidding the imposition of unequal burdens. Undoubtedly, since the adoption of that amendment the power of exemption is much more restricted than formerly—but that it may be extended to property used for objects of a public nature, is not questioned—that is, where the property is used for general promotion of the public well-being, and not for any private end. Thus property used for public instruction, for schools, colleges, and universities, which are open to all applicants on similar conditions, may properly be exempted. The public benefit is the equivalent to the State for the tax which would be otherwise exacted. If buildings, as churches, used for public worship, are also sometimes
106 exempted, it must be because apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws. Whatever the exemption, it can only be sustained for the public service or benefit rendered. The equality of protection which the Fourteenth Amendment declares that no State shall deny to any one is not thus invaded. That amendment requires that exactions upon property for the public shall be levied according to some common ratio to its value, so that each owner may contribute his just proportion to the general fund. When such exaction is made without reference to a common ratio, it is not a tax, whatever else it may be termed; it is rather a forced contribution, amounting in fact to naked confiscation. As most justly said by the supreme court of Kentucky, in the celebrated case of Lexington *vs.* McQuillan's Heirs, that whenever the property of a citizen is taken from him by the sovereign will and appropriated without his consent to the benefit of the public, the exaction should not be considered as a tax, unless similar contributions be exacted by the same public will from such members of the same community as own the same kind of property; and although there may be a discrimination in the subjects of taxation, still persons of the same class and property of the same kind must generally be subjected alike to the same common burden. (9 Dana, Ky., 513.)

The cases of People *vs.* Weaver, (100 U. S., 539,) and of Evansville Bank *vs.* Britton, (105 id. 322,) will illustrate the character of the discrimination of which the defendants complain. By an act of Congress, passed in 1864, and re-enacted in the Revised Statutes, the shares in national banks are allowed to be included in the valuation of the personal property of the owner in the assessment of taxes imposed by authority of the State in which the banks are located, subject to two restrictions; that the taxation shall
107 not be at a greater rate than is assessed upon other moneyed

capital in the hands of individual citizens of the State, and that the shares owned by non-residents of the State shall be taxed at the place where the bank is located, (R. S., sec. 5, 5219.) In People *vs.* Weaver, (100 U. S., 539,) the meaning of these restrictions upon the State was considered by the Supreme Court, and it was held:

1st. That the restriction against discrimination has reference to the entire process of assessment, and includes the valuation of the shares as well as the rate of percentage charged thereon;

2d. That a statute of New York, which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital, was in conflict with the restriction, although no greater percentage was levied on such valuation than on other moneyed capital; and

3d. That a statute which permitted a party to deduct his just debts from the valuation of his personal property, except so much as consisted of those shares, taxed them at a greater rate than other moneyed capital, and was therefore void as to them. The discrimination there condemned, by which an increased value was given to the shares of the national banks beyond what was given to other moneyed capital, is a discrimination similar to that which is made by the elimination of mortgages in estimating the value of railroad property in the cases before us. In *Evansville Bank* vs. *Britton*, the doctrine of this case is approved, and it was held that the taxation of shares in the national banks, under a statute of Indiana, without permitting the owner to deduct from their assessed value the amount of his *bona fide* indebtedness, as he was permitted in the case of other investments of moneyed capital, was a discrimination forbidden by the act of Congress.

That the proceeding, by which the taxes, claimed in these several actions, were levied against the railroad companies on taxa-
108 ble interests with which they had parted, was not due process of law, seems to me so obviously true as to require no further illustration. It goes almost without saying; and any additional argument would rather tend to obscure a truth which should be evident upon its simple statement. And if we assume that the mortgage in each case was a mere lien or incumbrance on the property affected, and not an interest in it, as the Constitution declares it is, then also is it clear that its elimination as an element in the valuation of the property of the defendants for taxation, whilst it was considered in the valuation of the property of natural persons, was a discrimination against the former, and led to unequal taxation against them. In neither view, therefore, was the assessment valid, and the taxation levied upon it cannot be sustained.

To justify these discriminating provisions and maintain the action in face of them, the plaintiffs have taken positions involving doctrines which sound strangely to those who always have supposed that the constitutional guaranties extend to all persons, whatever their relations, and protect from spoliation all property, by whom-

soever held. These positions are substantially as follows: That persons cease to be within the protection of the Fourteenth Amendment, and as such entitled to the equal protection of the laws, when they become members of a corporation; that property when held by persons associated together in a corporation is subject to any disposition which the State may, as its will, see fit to make; that, in any view, the property, upon which the taxes claimed were levied, was classified by its use, taken out of its general character as real and personal property, and thus lawfully subjected to special taxation; and that the power of the State cannot be questioned by the Southern Pacific Railroad Company by reason of the covenant in its mortgage. These positions are not advanced by counsel in this language or with the baldness here given; but they mean
109 exactly what is here stated, or they mean nothing, as will clearly appear when we analyze the language in which they are presented.

Private corporations—and under this head, with the exception of sole corporations, with which we are not now dealing, all corporations other than those which are public are included—private corporations consist of an association of individuals united for some lawful purpose, and permitted to use a common name in their business and have succession of membership without dissolution. As said by Chief Justice Marshall, "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men." (Providence Bank *vs.* Billings, 4 Peters, 514, 562)

In this State they are formed under general laws. By complying with certain prescribed forms any five persons may thus associate themselves. In that sense corporations are creatures of the State; they could not exist independently of the law, and the law may, of course, prescribe any conditions, not prohibited by the Constitution of the United States, upon which they may be formed and continued. But the members do not because of such association, lose their rights to protection, and equality of protection. They continue, notwithstanding, to possess the same right to life and liberty as before, and also to their property except as they may have stipulated otherwise. As members of the association—of the artificial body—the intangible thing called by a name given by themselves—their interests, it is true, are undivided, and constitute only a right during the continuance of the corporation to participate in its dividends, and on its dissolution to a proportionate share of its assets, but it is nevertheless property, and the courts will protect it, as they will any other property from injury or spoliation.

Whatever affects the property of the corporation, that is of all the members united by the common name, necessarily affects their
110 interest. If all the members of the corporation die or withdraw from the association, the corporation is dead; it lives and can live only through its members. When they disappear the corporation disappears. Whatever confiscates or imposes burdens on

its property, confiscates or imposes burdens on their property, otherwise there would be nobody injured by the proceeding. Whatever advances the prosperity or wealth of the corporation, advances proportionately the prosperity and business of the corporators, otherwise no one would be benefited. It is impossible to conceive of a corporation suffering an injury or reaping a benefit except through its members. The legal entity, the metaphysical being that is called a corporation, cannot feel either. So, therefore, whenever a provision of the Constitution or a law guarantees to persons protection in their property, or affords to them the means for its protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to corporations, not to the name under which different persons are united, but to the individuals composing the union. The courts will always look through the name to see and protect those whom the name represents. Thus, when the Constitution extended the judicial power of the United States to controversies between citizens of a State, and aliens and citizens of different States, its framers, apprehending that State tribunals in such controversies might be swayed by local feelings, prejudices, or attachments, Chief Justice Marshall, speaking for the whole Supreme Court, held that corporations were within the provision. "Aliens or citizens of different States," said that great judge, "are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen, but the persons whom it represents may be the one or the other, and the controversy is in fact and in law between these persons suing in their corporate character, by
111 their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals. Such has been the universal understanding on the subject." (The United States *vs.* Devaux, 5 Cranch, 86.)

Similar was the construction given by that court to a clause in the treaty of peace of 1783 between the United States and Great Britain. The sixth article provided that there should be "no future confiscations made nor any prosecutions commenced against any person or persons for or by reason of the part which he or they may have taken in the present war, and no person shall on that account suffer any future loss or damage, either in his person, liberty, or property." The State of Vermont undertook to confiscate the property of an English corporation and give it away; the corpotation claimed the benefit of the article, and recovered the property against the objection that the treaty applied only to natural persons, and could not embrace corporations, because they were not persons who could have taken part in the war,

or be considered British subjects. Much stronger is that case than the one now before us; but the Supreme Court saw with undimmed vision through the legal entity, the artificial creation of the State, the living human beings whom it represented, and protected them under their corporate name. (Society for the Propagation of the Gospel in Foreign Parts *vs.* The Town of New Haven, 8 Wheaton, 465.)

The Fifth Amendment to the Constitution declares that no person shall "be deprived of life, liberty, or property without due process of law." This is a limitation upon the Federal Government similar to such as exists in the constitution of several States against their own legislative bodies; and the term person thus
112 used has always been held, whenever the question has arisen, either by tacit assent or express adjudication, to extend, so far as property is concerned, to corporations, because to protect them from spoliation is to protect the corporators also.

Now, the Fourteenth Amendment extends, in this respect, the same prohibition to the States that the Fifth Amendment did to the Federal Government—"no State shall deprive any person of life, liberty, or property without due process of law"—and it adds to the inhibition, "nor deny to any person within its jurisdiction the equal protection of the laws." Surely by every canon of construction known to the jurisprudence of the country, the same meaning must be given to the term person in the latter provision as in the former.

The constitutional guaranties of due process of law and of equality before the law would be dwarfed into comparative insignificance and almost entirely emasculated of their protective force, if restricted in their meaning and operation, as contended by counsel. A large proportion of our people are members of some corporation—religious, educational, scientific, trading, manufacturing, or commercial—and the amount of property held by these and other corporations embraces the greater part of the wealth of the country. According to the report of the Commissioner of Railroads, made to the Secretary of the Interior, for the year ending June 30, 1882, the railroad companies operated that year 104,813 miles of railway, and transported 350 millions of tons of freight, of the estimated value of 12,000 millions of dollars. The value of these roads alone was 2,600 millions of dollars, and they employed that year 1,200,000 persons in operating the roads, besides 400,000 in construction—a total of 1,600,000 persons—about one thirty-second part of our population estimated at 53,200,000.*

The value of the property of manufacturing companies is
113 over 1,000 millions of dollars; of national banks over 700 millions; of insurance companies, over 600 millions; of mining companies, over 300 millions; and of telegraph com-

*These figures are taken by the Commissioner from the estimate of Henry V. Poor, a compiler of railroad statistics.

panies and shipping companies, each over 100 millions of dollars. Indeed, the aggregate wealth of all the trading, commercial, manufacturing, mining, shipping, transportation, and other companies engaged in business, or formed for religious, educational, or scientific purposes, amounts to billions upon billions of dollars—and yet all this vast property, which keeps our industries flourishing, and furnishes employment, comforts, and luxuries to all classes, and thus promotes civilization and progress, is lifted, according to the argument of counsel, out of the protection of the constitutional guaranties, by reason of the incorporation of the companies—that is because the persons composing them—amounting in the aggregate to nearly half the entire population of the country—have united themselves under the law for the convenience of business. If the property for that reason is exempted from the protection of one constitutional guaranty, it must be from all such guaranties. If because of it the property can be subjected to unequal and arbitrary impositions, it may for the same reason be taken from its owners without due process of law, and taken by the State for public use without just compensation. If the position be sound, it follows that corporations hold all their property and the right to its use and enjoyment at the will of the State; that it may be invaded, seized, and the companies despoiled at the State's pleasure. It hardly need be said that there would be little security in the possession of property held under such a tenure, and of course little incentive to its acquisition and improvement.

But in truth the State possesses no such arbitrary power over the property of corporations. When they are allowed to acquire and own property, they must be treated as owners, with all the rights attendant upon ownership. They have a constitutional right to
114 be so treated. Whatever power the State may possess in their creation or in amending their charters, it cannot withdraw their property from the guaranties of the Federal Constitution. As was said in the San Mateo case: "It cannot impose the condition that they shall not resort to the courts of law for the redress of injuries or the protection of their property; that they shall make no complaint if their goods are plundered and their premises invaded; that they shall ask no indemnity if their lands be seized for public use, or be taken without due process of law; or that they shall submit without objection to unequal and oppressive burdens arbitrarily imposed upon them; that, in other words, over them and their property the State may exercise unlimited and irresponsible power. Whatever the State may do, even with the creations of its own will, it must do in subordination to the inhibitions of the Federal Constitution."

The doctrine of unlimited power of the State over corporations, their franchises and property, simply because they are created by the State, so frequently and positively affirmed by counsel, has no foundation whatever in the law of the country. By the decision of the Supreme Court of the United States in the Dartmouth College case, it was settled, after great consideration, that the char-

ter of a corporation under which its franchise — its capacity to do business and hold property—is conferred, is a contract between the corporators and the State, and, therefore, within the protection of the Federal Constitution prohibiting legislation impairing the obligation of contracts. So far from the State having unlimited control over the franchise and property of corporations, because of its paternity to them, it has under that decision, only such as it possesses over the contracts and property of individuals. It cannot, from that fact alone, alter, lessen, or revoke their franchises, although they be a free gift. It cannot, from that fact alone, interfere with or impose any burdens upon their property, except as it can interfere with and impose burdens upon
115 the property of individuals. Such is the doctrine not only of the Dartmouth College case, but of an unbroken line of decisions of the Supreme Court of the United States and of the supreme courts of the several States since that case. To avoid that limitation upon their power, most of the States since the Dartmouth College case have reserved in the charters granted a right to repeal, amend, or alter them, or have inserted in their constitutions clauses reserving a right to their legislatures to repeal, alter, or amend charters granted, or to repeal, alter, or amend general laws under which corporations are permitted to be formed. This reservation, in whatever form expressed, applies only to the contract of incorporation, without which the contract would be beyond the revocation or change of the State. The reservation removes any impediment which otherwise would exist to legislation on what was granted. It leaves the corporation in the same position it would have occupied had the Supreme Court held in the Dartmouth College case that charters are not contracts, and that laws repealing or modifying them did not impair the obligation of contracts. It accomplishes nothing more. Therefore the legislation authorized by it must relate to the contract embodied in the charter, amending, altering, or abrogating its provisions. Legislation touching any other subject is not affected by the reservation; is not authorized by it, nor forbidden by it. Its whole scope and meaning is to enable the State to pass laws with respect to the charter—the contract of incorporation—which otherwise would be in conflict with the clause of the Federal Constitution prohibiting legislation impairing the obligation of contracts. Legislation dealing with the corporation in any other particular is entirely distinct from it, and depends for its validity upon a compliance with the same conditions which determine the validity of general legislation.

The State may of course accompany its grant with such
116 conditions as it may deem proper for the management of the affairs of the corporation which do not impinge upon any provision of the Federal Constitution; and by the reservation clause it will retain control over the grant, and may withdraw it or modify it at pleasure. It is on this ground that the State has asserted a right to regulate the charges—the fares and freights—

of corporations. It is a novel doctrine that it can on that ground also control the property of corporations, appropriate it, burden it, and despoil them of it, as it may choose, unrestrained by any constitutional inhibitions. That doctrine has no standing as yet in the law of this country. The property acquired by corporations is held independently of any reserved power in their charters. By force of the reservation the State may alter, amend, or revoke what it grants; nothing more. It does not grant the tangible and visible property of the companies, its roads, its roadway, road-bed, rails, or rolling-stock. These are the creation or acquisition of the companies. Over them it can exercise only such power as may be exercised through its control of the franchise, and such as may be exercised over the property of individuals engaged in similar business.

As justly said by the supreme court of Michigan, speaking by Mr. Justice Cooley, "It cannot be necessary at this day to enter upon a discussion in denial of the right of the Government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired, whether by labor or in the ordinary vocations of life, by gift or descent, or by making profitable use of a franchise granted by the State, it is enough that it has become private property, and it is then protected by the law of the land." (Detroit *vs.* Detroit and Howell Plank Road Company, 43 Mich., 146–7.)

117 But it is urged that even with an admission of these positions, property may be divided into classes and subjected to different rates; that such classification may be made from inherent differences in the nature of different parcels of property, but also from the different uses to which the same property may be applied; and it is sought to place the tax levied in these cases under one of these heads. As already mentioned, the constitution of the State provides with respect to property that it shall be taxed in proportion to its value; it provides for no specific tax upon any article. The classification of property either from its distinctive character or its peculiar use must be made within the rule prescribing taxation according to value. Real and personal property differing essentially in their nature may undoubtedly be subjected to different rates; real property may be taxed at one rate, personal property at another. But in both cases the tax must bear a definite proportion to the value of the property. So also, if use be the ground of classification, for which a different rate of taxation is prescribed, the rate must still bear a definite proportion to the value. Now there is no difference in the rate of taxation prescribed by the law of the State for the property of railroad corporations and that prescribed for the property of individuals. There is only one rate prescribed for all property. There is, therefore, as said in the San Mateo suit no

case presented for the application of the doctrine of classification either from the peculiar character of railroad property or its use.

The ground of complaint is not that any different rate of taxation is adopted—for there is none—but that a different rule is followed in ascertaining the value of the property of railroad corporations, as a basis for taxation, and that followed in ascertaining the value of property held by natural persons. In estimating the value in one case certain elements are considered by which the value as a basis for taxation is lessened; in estimating the value in
118 another case those elements are omitted by which the valuation is proportionately increased. All property of railroad corporations, whether used in connection with the operation of their roads or entirely distinct from any such use, is estimated without regard to any mortgages thereon, whilst the property of natural persons is valued with a deduction of such mortgages.

Of the property of the railroad company—the Southern Pacific—several millions of acres of farming lands are included in the same mortgage which covers the roadway, road-bed, rails, and rolling-stock of the company. No distinction is made in the assessment of the value of any of this property from the use of it. The whole is assessed in the same manner without regard to the mortgage thereon; and the taxes on the whole of it thus assessed, with the exception of the taxes on the road-bed, roadway, rails, and rolling-stock, have been paid by the companies, or parties to whom since the levy certain parcels have been sold. The discrimination between the railroad companies and individual proprietors, in the estimate of the value of their property, is made because of its ownership, and not for any specific differences in the character of the property, or specific uses to which it is applied.

The farming lands held by the company are not different in character from adjoining farming lands held by natural persons, and yet they are assessed under the system established by the constitution of the State upon different principles. The road-bed, roadway, rails, and rolling-stock of the railroad companies, defendants herein, are not different in their nature or use from the road-bed, roadway, rails, and rolling-stock owned in many cases by natural persons, and yet they are subject to a different rule of assessment. It is not classifying property to make a distinction of that character in estimating its value as a basis for taxation. It is classifying property according to its ownership. And if this can be done, there is no protection against unequal and oppressive taxation. As justly observed
119 by Mr. Edmunds in the San Mateo Case: "If you once concede the point that you may classify different rates upon the values of things, or may put up your values on different principles, as values by deductions or otherwise—which is the same thing stated in another way—then there is no check upon the exercise of arbitrary power. The mob or commune that can get possession of the State Legislature for one term may despoil every one of the citizens whom it chooses to despoil, and the liberty and the security

of the Constitution of the United States, secured through painful exertion and great consideration, crystallized in unmistakable language—historic indeed, and beneficent as it is historic, securing national intrinsic rights everywhere and to everybody—will turn out to be an utter sham and delusion."

If to the position of counsel that property may be classified simply because owned by a corporation, and thus differently assessed, we add the further position that the owner of the property assessed has no constitutional right to have notice of the assessment, or to be heard respecting it, though it be double or treble the value of the property—though the property be assessed at thousands, when worth only hundreds—we have a government established with a power of oppression under which no free man should ever be contented to live.

In the argument of counsel, the distinction between taxes for licenses and franchises, and taxation upon values, seems to have been overlooked, and because no notice is required in the former case, and no opportunity given to be heard, therefore it is contended that the rule is not sound, that notice is necessary, and an opportunity of being heard in the latter case where an assessment is made upon property and values are found upon evidence; and yet the distinction is plain and everywhere recognized. A license tax paid by an insurance company of another State, in order to exercise its corporate powers in this State, is the consideration given for a
120 privilege which the company may take or not take; if taken, the fee must be paid. Of course, no notice there is necessary. If a person wishes a license to do business at a particular place, or of a particular kind, such as selling liquor, cigars, clothes, or keeping a restaurant or hotel in a city, he is only to pay what the law requires and go into the business. Notice in such cases would be of no service to him, and no hearing could change the result. And the State may exact the payment of a particular sum—such as it deems proper—as a condition of the grant of corporate powers, or for their continuance, and may reserve the right to alter this condition as it may choose. In such cases also no notice can be required, or opportunity of being heard; for notice or hearing could be of no service to the company. Here we are not considering of compensation to be paid for franchises or privileges of any kind, whether designated as taxes or license fees, but of taxation upon values. Where these are to be ascertained, and evidence is taken for that purpose, and a determination is to be made which is judicial in its character, there the owner must in some form—in some tribunal—have an opportunity afforded him to be heard respecting the proceeding under which his property may be taken before such proceeding is final and the valuation is irrevocably fixed. And in such cases there can be no valid deprivation of his property without it.

The notice to which we refer need not be a personal citation; it is sufficient if it be given by a law designating the time and place

where parties may contest the justice of the valuation. As a general rule only a statutory notice is given. The State may designate the kind of notice and the manner in which it shall be given. All that we assert, or have ever asserted, is that there must be a notice of some kind which will call the attention of the parties to the subject, and inform them when and where they will be permitted to expose any alleged wrong in the valuation, of which they may complain.

121 It was with reference to the class of cases, where values are to be found upon evidence, that we said in the San Mateo suit, that notice and opportunity to be heard were essential to the validity of the assessment, and without which the proceeding by which the tax-payer's property was taken from him, would not be due process of law. We have heard nothing in the argument of the present cases, or in the criticism of the authorities which in the slightest degree affects the accuracy of the statement. In Stuart *vs.* Palmer, (74 N. Y., 191,) the court of appeals of New York, in an elaborate opinion, speaking by Mr. Justice Earl, said: "It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law.' Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably better, as recently stated by Justice Miller, of the United States Supreme Court, 'to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' (Davidson *vs.* New Orleans, 96 U. S., 104.) It may, however, be stated generally, that due process of law requires an orderly proceeding adopted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard is absolutely essential. *We cannot conceive of due process of law without this.*" And, again, "It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some stage of the proceedings. That due process of law requires this, has been quite uniformly recognized."

Numerous other authorities might be cited to the same purport, and the language of Judge Cooley, in his treatise on taxation, which exhibits a thoughtful consideration of the subject, and

122 a careful examination of the adjudged cases, expresses the established law. Speaking of tax cases, he says: We should say that notice of proceedings in such cases, and an opportunity for a hearing of some description, were matters of constitutional right. It has been customary to provide for them as a part of what is 'due process of law' for these cases, and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended or could be construed to sanction legislation under which officers might secretly assess one for any amount in their discretion, without giving him an opportunity to contest

the justice of the assessment. It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard; and it has also been justly observed of taxing officers, that 'it would be a dangerous precedent to hold that any absolute power resides in them to tax as they may chose without giving any notice to the owner. It is a power liable to great abuse,' and it might safely have been added, it is a power that under such circumstances would be certain to be abused. 'The general principles of law applicable to such tribunals oppose the exercise of any such power.'" (Cooley on Taxation, 266.)

The suggestion of counsel that there is a difierence in the law as to notice and opportunity of being heard, where an assessment is made for local purposes, and where the assessment is made under a statute providing revenue for the State, is without any foundation. Taxation for local improvements, or for city, county, or town purposes, involves the exercise of the same power exerted in taxation for State or general purposes. It is the sovereign power of the State in both cases which authorizes the tax, whether that power be exerted directly by an act of the legislature, or by a municipal body as an instrumentality of the State. "That these assessments," says Cooley, speaking of such as are special, "are
123 an exercise of the taxing power, has over and over again been affirmed until the controversy may be regarded as closed." And this statement is supported by a reference, in a note to his treatise, to numerous adjudged cases, (p. 430.)

The object both of taxation for general purposes and of assessments for local purposes is to raise money. In both cases property is valued and a certain proportion of the valuation taken for the designated purpose. Whether that purpose be general or local in no respect changes the essential character of the proceeding. The property from which the exaction is to be had is less extensive in the one case from that in the other. But in both there must be evidence of the value of the property and a judicial determination respecting it. And the fact that in cases of local improvements there is sometimes a consideration also of the benefits to be received, takes nothing from the judicial character of the proceeding to determine the value of the property affected.

The clause of the Constitution which forbids deprivation of property without due process of law, places liberty under the same guaranty, and no one can be deprived of either—property or liberty, under the name of taxation, any more than under any other name, by officers of the State, without some notice of their proceedings, and a right to be heard respecting their determination before it is executed.

The covenant in the mortgage of the defendant, the Southern Pacific Railroad Company, can not affect one way or the other the right of the plaintiff to recover against that company. The power of the State is not enlarged or diminished by it. It is not made

with the State and could not be enforced by it. So far as the power or action of the State is concerned, it cannot possibly have any influence. It is a matter which concerns only the parties. They can by arrangement vary it any day; they may enlarge it, qualify it, or release it, whenever they choose. It would be strange indeed if
the power of the State in taxation depended in any way upon
124 the stipulation of third parties, or the validity of a tax could
be affected by it. The covenant reads as follows: "And the said party of the first part hereby agrees and covenants to and with the said party of the second part and their successors in said trust, that it will pay all ordinary and extraordinary taxes, assessments, and other public burdens and charges which shall or may be imposed upon property *herein described and hereby mortgaged, and every part thereof.*" Then follows a provision that the mortgagees or any bondholder may, in case of default by the mortgagor, pay and discharge the taxes and any lien or incumbrance upon the property prior to the mortgage, and that for such payments the party making them shall be allowed interest and be secured by the mortgage.

The covenant is necessarily limited to such taxes as may be lawfully levied on the mortgaged property, such as the mortgagor is personally bound to the State to pay, and to such other liens as may arise from his previous contract with respect to the property. The mortgagor could not be required to pay any other taxes or discharge any other liens, and should the mortgagees pay or discharge any other they could not hold the mortgage as security for the amount, or the mortgagor liable. The covenant cannot be construed to extend to such taxes as may be levied in disregard of the constitution or laws, nor to such liens as may arise from a tax on other than the mortgaged property, or from any act of the mortgagees, or any judgment against them. Should a judgment, for instance, against them become a lien upon all their interests in real property and among others than conferred by the mortgage, it would not be embraced by the covenant. That does not cover taxes levied or leviable on the mortgage, or on the bonds secured; they are not within its terms, and the State can not enlarge its meaning.

At the time the mortgage was given, there had been conflicting
decisions of the supreme court of the State as to the liability
125 of mortgages to taxation. It must be supposed that the
parties were well acquainted with these rulings, and, though the last decision then rendered was against their taxation, it was the subject of popular comment and discontent; and counsel inform us was one of the most persuasive causes which led to the convention to change the constitution. If the parties, therefore, had intended to enter into a covenant which should bind the mortgagor to pay taxes which might thereafter be levied on the mortgage, it would have been the natural and easy way to have said so. Not having said so, we cannot impute to the language used anything beyond its plain meaning—and that is that the mortgagor would pay such taxes and discharge such liens on the property as should be legally

chargeable to the mortgagor, not such as the law might afterwards impose upon the mortgagees. In fact, the covenant creates no greater liability on the part of the mortgagor than would have existed without it; and it was inserted only out of abundant caution. Every mortgagor is bound to pay the taxes lawfully levied on the property mortgaged, and to discharge any liens created by his previous act; and if at any time the mortgagee is compelled to pay the taxes and discharge such liens to preserve the security, he can collect the amount from the mortgagor. So the question comes back to the original point in the case—Were the taxes levied for which the present action was brought lawfully levied? If so, they can be enforced whatever may be the private relations or stipulations between the parties to the security. If not lawfully levied, if the law or State constitution, under which they were levied, is in conflict with the inhibitions of the Federal Constitution, if the taxes were levied upon interests with which the mortgagor had parted, they cannot be enforced, whatever may be the pledges of the parties to each other. The State must show that there rests upon the mortgagor a legal obligation to it to pay the taxes, arising upon its constitution or laws, not from any stipulation the parties may
126 have made with each other, as to which the State has no concern. The action is not to enforce a lien upon the property; it is for a personal demand, and a personal liability to the State must be shown. No other liability of any kind to any party can aid a recovery.

The covenant we have been considering is not contained in the mortgage on the lands of the Central Pacific Company, and for such lands in California, amounting to upwards of six hundred and fifty thousand acres, that company is assessed and taxed without any deduction of the mortgage from their value, just as the Southern Pacific is taxed for its lands. The amount due on the land mortgage is over five and a half millions of dollars.

I have thus gone over, so far as I deem it necessary or important, the several positions of counsel for the plaintiffs, and I find in none of them any sufficient answer to the objection of the defendants. This opinion might, therefore, close with a simple order directing judgment for the defendants. But owing to the misapprehensions, that have largely prevailed in the community since the trial of the San Mateo Case, which involved similar questions, as to the effect of a decision against the State, upon its right to subject railroad property to its just proportion of the public burdens, I will venture to make some suggestions as to the manner in which all such demands of the State may be enforced without infringing upon any principal of constitutional law. I am profoundly sensible of the irritation which a supposed desire to escape from the just burdens of government naturally creates. The more powerful, the more wealthy the party, the more intense the feeling, and it finds expression in words of bitter complaint, not merely against the party, but sometimes also against any administration of

justice which tolerates such supposed evasion. It is sometimes forgotten that the courts cannot supply the defects of the law, nor always correct the mistakes of public officers, or the errors of
127 even learned counsel. Certainly no member of this court would in any way countenance the escape of anybody from his just obligations, but it cannot with any seeming justice, declare that one party shall discharge an obligation which the law, properly administered, would impose upon another. Its duty is to administer the law as it finds it, not to make it, never forgetting that its administration must always be in subordination to the great principles for the protection of private rights, embodied in our National Constitution, which are of priceless value to every one in the State.

The railroad companies in California are taxed yearly to an amount exceeding $600,000. Their property is heavily incumbered with mortages, amounting to much more than its actual value. Why should they not be allowed by law, if they pay this sum, to credit it on their mortgages, as any natural person paying it would be allowed? Why should this unjust discrimination be made against them? Why should they by law be denied a credit for this more than $600,000 a year? Is there any justice in this denial? There is no difficulty in assessing and taxing the mortgages, if the words "except as to railroad and other *quasi* public corporations," be eliminated as invalid from the constitution. The imaginary difficulty has arisen from the supposed necessity of taxing the debts, the bonds secured. As these are held in different parts of the country, some out of the State, it would be impossible, it is said, to reach them. But the answer is that the taxes should be placed upon the mortgages, which for purposes of assessment and taxation are to be treated as interests in the property mortgaged, as much so as if it had been actually conveyed to the mortgagees. The records of the different counties show the mortgages. The assessors of each can return to the Board of Equalization the value of the property covered by the mortgages in their respective counties, under section 3678 of the Political Code. The Board would then
128 have the value of the property of the companies and the amount of the mortgages before them. The mortgage of the Southern Pacific being greater than the value of the entire mortgaged property, it would be assessed at such value. It could never, as a mortgage, be worth more than the property. If necessary or convenient, the assessment of the mortgage on the roadway, road-bed, rails, and rolling-stock could be stated separately from the value of the mortgage on other property of the company, and apportioned to the different counties as at present. The value of the mortgage on other property could also be apportioned as required by the Politcal Code. Why then should not this system be pursued? The State would thus collect all the taxes which it ought to collect. The tax being a lien upon the property, could be enforced by a sale of the property, just as though it was levied on the

property, and not upon the mortgages. If the companies should then pay the tax, they could by the law claim credit for it on their mortgages, and it would be deducted in the payment of the interest or principal of the bonds. Then justice would be done to the corporations as it is done to individuals. The same proceeding could be pursued with the first mortgage on the property of the Central Pacific. That also being greater than the value of the property, the State would be able to collect as large a revenue as by taxation on the property itself, and the company would have the benefit of the payment by a credit on its mortgage.

It follows from the views expressed that findings must be had for the defendants, and judgment in their favor entered thereon.

129 *Concurring Opinion.*

SAWYER, Circuit Judge.—The discussion in this opinion, although applicable to all the cases tried, will have special reference to the facts in the case of Santa Clara county, No. 3074.

This case is similar, in the main features, to that of San Mateo County *vs.* Southern Pacific Railroad Company, decided by this court last year. (8 Sawyer, 281.)

The questions involved required, for their solution, a con-
130 struction of two clauses in the first section of the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Does the requirement of *due process of law*, extend to the taking of property by taxation, and does equality of protection by the laws secure a person, whatever his association with others in business, from the imposition of greater burdens of taxation than such as are equally imposed upon others under like circumstances? Or, are persons ex-
131 cepted from the protection of these provisions, when their property is taken for the support of Government, or when they are associated with others in a corporation for the more convenient transaction of their business?

First. As to the meaning of the phrase, "due process of law," found in the amendment, I used this language in the San Mateo case: "No one, I apprehend, would for a moment contend that a man's life, or his liberty, could be, legally, taken away, without notice of the proceeding, or without being offered an opportunity to be heard, or that a proceeding whereby his life or liberty should be forfeited, or permanently affected, without notice or opportunity to be heard in his own defense, could, by any possibility, be by 'due process of law.' In *such* cases there could be no just conception of 'due process of law' that would not embrace these elements of notice and opportunity to be heard. Any conception excluding these elements would be abhorrent to all our ideas of either law or justice. If these elements must enter into, and constitute an essential part of, due process of law, in respect to life and liberty, they

must also constitute essential ingredients in due process of law where property is to be taken; for the guaranty in the constitution is found in the same provision, in the same connection, and
132 in the identical language applicable to all. One meaning, therefore, cannot be attributed to the phrase with respect to property, and another with respect to life and liberty. (Ib., 288.)

And it was argued that the same construction must be given to the same language, when used in the same relation with reference to property, that is given when used with reference to life and liberty, and therefore that due process of law, whereby a party is to be deprived of his property, as one element or ingredient, must include an opportunity to be heard. And it was said this principle was conceived to be established by an unbroken line of au-
133 thorities. On the trial of this case counsel have vehemently assailed this doctrine, accompanied with the confident assertion, that it has *not* the sanction of any authority, and that the only authority upon the point is against it, and was not referred to by the court or by counsel in the San Mateo case. It may be well, therefore, to give some further notice to the position thus asserted.

134 No counsel has yet appeared, who has endeavored to maintain the proposition that, if a man's life is taken, or he is permanently deprived of his liberty, by some secret tribunal or body of men, without having notice or an opportunity to be heard in his own defense, he has had the benefit of "due process of law." If there was anything that was settled under the principles of the common and the constitutional law of England, before the severance of the colonies from the mother country, and the establishment of our National Constitution, it is, that no man can be deprived of his life, or his liberty, without a trial by his peers—without an opportunity to be heard in his own defense. The law of the land—due process of law—vouchsafed to him this right or privilege. A man deprived of life without enjoying the right of an opportunity to be heard, is simply assassinated, or murdered; and the man permanently immured in a dungeon for an imputed offense, upon the order of any man or body of men, without an opportunity to be heard against the charge made, is arbitrarily, and, despotically, deprived of his liberty without authority of law—without "due process of law," or in direct violation of "the law of the land." So, also, I have understood it to be equally well established, as a part of the common and constitutional law of England, as a general rule, that no man's property can be lawfully taken from him against his will without an opportunity of being heard.

These rights of life, liberty, and property, are all fundamental, personal, rights of the same grade, or character. They are treated as such, in the amendment to the Constitution in question; and placed upon precisely the same legal footing, in the same sentence, the identical words, without even a repetition, covering them all—nor "shall deprive any person of life, liberty, or property, without due process of law." No one has attempted to maintain the propo-

sition, that a person can be lawfully deprived of his *life*, or
135 *liberty*, without an opportunity to be heard, nor has any one, so far as I am aware, endeavored to show that "due process of law," as a general rule, respecting notice and an opportunity to be heard, means one thing with reference to depriving one of life, and liberty, and something else, with reference to depriving him of property. It is only sought by counsel to maintain that "due process of law" does not *universally* require an opportunity to be heard, as a condition of lawfully depriving one of his property, without considering the other branch of the proposition at all. It devolves upon those who maintain that there is a difference in the signification of this clause, as a general rule, as applied to life and liberty, and to property, to clearly establish it; and if there is an exception to the universality of the rule, to point it out and show that the case under consideration is within the exception.

Counsel, in combating the principle stated, insist that the language used by the court, is altogether too broad; that there are cases—peculiar cases—as shown by the authority cited by him, to which it is inapplicable. If this were so, it would only show that there may be exceptions to the general rule, depending upon special circumstances and long established usage. But it would, then, be necessary to show that the case in hand is within some recognized exception, and this has not been done.

136 In the San Mateo case we disclaimed any attempt to give an accurate definition of the term "due process of law," that should be "applicable to all cases," as it was not deemed "necessary for the determination of that case to do so." This disclaimer left room for exceptions founded upon long recognized and well established usage.

We there said, that "to take one's property by taxation, is to deprive one of his property; *and if not taken in pursuance of the law of the land*, in some due and recognized course of proceedings *based upon well recognized principles in force before and at the time this clause was first introduced into the various constitutions and the legislation of the country*—is to take it without due process of law." The doctrine was recognized that those forms and courses of proceeding, based upon well recognized principles in force before and at the time of the adoption of our National Constitution, would be "due process of law." The case of Murray's Lessee *et al. vs.* Hoboken Land and Improvement Company, (18 How., 274,) upon which counsel rely, is a case of the kind—an exception to the ordinary rule of law depending upon the peculiar character, conditions, and circumstances of the case.

The mode of proceeding in this particular class of cases, had the sanction of long established usage in England before and down to the settlement of our country, and Mr. Justice Curtis' whole opinion is a labored effort to show that the case he was discussing, was an exception to the ordinary rule of law, dependent alone upon long established and exceptional usage. The case was that of a *de-*

faulting public officer, who had collected a large amount of public revenue of the United States and appropriated it to his own use. The act of Congress provided a summary mode of proceeding to collect the money from him. It provided, among other things, for an auditing of the defaulting official's accounts, and certifying the amount due by the proper officers of the Treasury (the accounts are made up from the returns of the officer himself, and are *matters of record* in the Treasury Department;) that when so audited and certified, it should become a lien on the property of the defaulting officer, which should be enforced by seizure and sale, under a distress warrant issued by the solicitors of the Treasury. The Constitution having invested the judicial power in the courts mentioned in it, and declared that the judicial power shall extend to controversies to which the United States are a party; the questions were, whether these acts, under the statute of 1820,
137 were an exercise of judicial power, vested solely in the courts; and if not an exercise of judical power, whether such a seizure, under the warrant without the action of the judical power, did not deprive the party of his property "without due process of law," in violation of the provisions of the Constitution on that point. Or, as stated by Mr. Justice Curtis himself, the questions were, whether "a collector of customs, from whom a balance of account has been found to be due by accounting officers of the Treasury, designated for that purpose by law, can be deprived of his liberty or property in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by 'due process of law,' within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law?" He discusses the question as to what is meant by "due process of law," and concludes that a distress warrant, so far as the warrant itself is concerned, is due process of law, provided there was no judicial action necessary as a basis for the warrant; for Congress can prescribe any kind of process, so far as the form and mode of issue is concerned. He then discusses the question as to whether the action of the Treasury Department in auditing and certifying the account constituted a sufficient basis for the warrant to make the proceeding due process of law. There being nothing in the Constitution to expressly authorize the proceeding, he "looked to the usages and modes of proceedings existing in the common and statute laws of England, before the emigration of our ancestors from England, and which are not shown to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." He found in regard to debtors of the King—defaulting receivers of the revenue in particular—that a summary remedy existed, and a writ of extent might be levied upon their goods and lands; but "to authorize a writ of
138 extent, however, the debt must be *matter of record* in the King's Exchequer." Thus the debt was already ascertained by matter of record.

"In regard to debts due upon simple contracts, other than those due from collectors of the revenue, and other accountants of the Crown, the practice from very ancient times has been to issue a commission to inquire as to the nature of the debt"—a proceeding of a strictly judicial nature. These proceedings were had under various acts of Parliament—that omnipotent legislative body, which could repeal *Magna Charta* itself.

Justice Curtis proceeds: "This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England is sufficient to show that the methods of ascertaining the existence and amount of *such* debts, and compelling their payment, *have varied widely* from the *usual* course of the common law *on other subjects*, and that as respects *such* debts, due from *such* officers, the law of the land authorized the employment of auditors and an inquisition without notice, and a species of execution, bearing a very close resemblance to what is termed a warrant of distress in the act of 1820, now in question." "It is certain that this *diversity* in the law of the land between *public defaulters* and *ordinary debtors* was understood in this country and entered into the legislation of the colonies and provinces, and more especially of the States, after the Declaration of Independence and before the formation of the Constitution of the United States."

As thus seen, this mode of enforcing the payment of balances was limited to defaulting collectors and "receivers of the public revenues of England, and where the debts *were of record* in the King's Exchequer." And it shows that the methods of ascertaining the existence and amount of *such* debts and compelling their payment have *varied widely from the usual course of the common law on other subjects*, "and as respects *such* debts due from *such* officers 'the law
139 of the land' authorized" a summary process similar to that of the law of 1820; and "this diversity in the 'law of the land' between public defaulters and ordinary debtors was understood in this country." Thus, this mode of proceeding was an exception to the general rule as to what is "the law of the land" or "due process of law" made in favor of the King against those who accepted office from him, under and subject to laws burdened at the time with peculiar and stringent remedies, and then violated their duties and trusts by appropriating the public revenues collected, instead of putting them into the treasury, and whose indebteness was "matter of record in the King's Exchequer." This exception is recognized by the court, but *as an exception*, and the decision is put upon the ground that it *is an exception*, and not the rule. "For," says Mr. Justice Curtis, "though 'due process of law' *generally* implies *actor, reus, judex*, regular allegations, *opportunity to answer, and trial according to some settled course of judicial proceedings*, (2 Inst., 47, 50; Hoke *vs.* Henderson, 4 Dev., N. C., 15; Taylor *vs.* Porter, 4 Hill, 146; Van Zant *vs.* Waddell, 2 Yerg., 260; State Bank *vs.* Cooper, *id.*, 599; Jones' Heirs *vs.* Perry, 10 *id.*, 59; Green *vs.* Briggs, 1 Curtis, 311,) yet this is not *universally* true." An *excep-*

tion, then, is found in cases against *defaulting public officers whose debts are of record;* and such was the case in Murray's Lessees *vs.* Hoboken Land and Improvement Company.

The court, in speaking of such defaulting officers, further says, Congress has power to levy and collect taxes, etc., "What officers should be appointed to collect the revenue thus authorized to be raised, and to disburse it in payment of the debts of the United States; what duties should be required of them; when and how, and to whom they should account, and what security they should furnish, and to *what remedies they should be subjected to enforce the proper discharge of their duties, Congress was to determine.* In the ex-
140 ercise of their powers, they have required collectors of customs to be appointed; made it incumbent on them to account, from time to time, with certain officers of the Treasury Department, and to furnish securities by bond, for the payment of all balances of the public money which may become due from them. And by the act of 1820, now in question, they have undeataken to provide *summary means to compel these officers—and in case of their default, their sureties—to pay such balances of the public money as may* be in their hands.

Whatever may have been the grounds of the distinction originally made between defaulters among public revenue officers, and other citizens, the case of such defaulting officers is clearly shown to be an exception to the general rule, resting upon very special circumstances; and the case affords *a striking illustration of the maxim, that "the exception proves the rule."*

But again, under the statute of 1820 (3 Stat. U. S., 595) by express provisions of section 4, the party did in fact have an opportunity to be heard, before he could be deprived of his property. That section provided, "that if any person should consider himself aggrieved by any warrant issued under this act, he may prefer a bill of complaint to any district judge of the United States, setting forth the nature and extent of the injury of which he complains," and have a hearing. It is true, that there was a determination of his liability, and process issued, that would become final, and conclusive, if he did not ask for a hearing, and Mr. Justice Curtis observes upon this section: "The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the Treasury. But until it is reviewed, it is final and binding." And in all cases of taxes under the constitution of California, except where the assessment is made by the State Board of Equalization, the assessment is first made by the assessor and the tax-payer may afterwards, on a proper petition, have the action of the assessor reviewed by the Board of
141 Equalization, and thus have an opportunity to be heard, before his property is finally appropriated, yet, if he does not apply for such review, the tax levy becomes final and conclusive, and will be collected in the ordinary way by seizure and sale, or such other means as may be provided.

Both the ordinary taxpayer, under the laws of California and the

defaulting officers under the act of 1820, therefore, have an opportunity to be heard before their property can be finally appropriated, in a similar sense, and at a corresponding stage of the proceeding. If the opportunity thus afforded the taxpayer is in accordance with due process of law within the general rule, it is not apparent why the opportunity afforded the defaulting officer by the act of 1820 is not, also. They both stand upon the same footing, as to the time when an opportunity to be heard is given—the first determination before a hearing being only provisional; the accounting and seizure under the act of 1820 being something in the nature of an attachment to secure a lien, with an opportunity to be afterwards heard, if the amount claimed by the Government is not, in fact, due.

In our judgment, this case, in no sense or particular, conflicts with the point decided by us as to the general rule—and the rule applicable to that case—in the San Mateo county case; on the contrary, we think it a strong case to support the rule. It was cited by counsel and considered by us in the San Mateo case, but we did not think it militated against our decision, and we did not deem it necessary to extend the discussion by noticing it in the opinions delivered.

But after carefully reviewing the case, in consequence of its being so, confidently, relied on, and the only one relied on, as being directly inconsistent with our decision on this point, we think it may well be cited by us, as a strong authority in support of our
142 judgment. These tax cases, certainly, are not within the exception recognized in that case. The case is the only authority cited—unless the Illinois Railroad Tax Cases (92 U. S., 575) were so regarded by counsel—claimed to be in direct conflict with our decision on this point, and this had no relation at all to what is necessary to constitute a valid levy of a public tax. No authority was cited to show that a tax levy upon property to be assessed upon evidence of its value is one of the exceptions to the general rule, that an opportunity to be heard before property can be taken from its owner, and appropriated to public use is an essential element of "due process of law."

In the Illinois Railroad Tax Cases, referred to by counsel, the points discussed and relied on, were, that the act under which the tax was levied and equalized was void, as being in contravention of the constitution of that State; and that the bills in chancery filed, presented no case for an injunction, for the reason that there had been no payment, or tender of so much of the tax as was conceded ought to be paid. The court rested its decision, mainly, upon the latter ground, but, also, held that as the supreme court of Illinois had decided the act not to be in contravention of the State constitution, that decision would control the action of the courts of the United States. The court, however, expressed its concurrence with the views of the State supreme court on that point.

In the course of the opinion delivered, it was said that the State Board of Equalization, of Illinois, in equalizing the taxes of the sev-

eral counties—the equalization being by classes and counties—need give no notice to individual taxpayers, other than such as the law afforded; but, as I understand the decision, this was said with reference to the point, whether the statute was valid under the State constitution. There does not appear to have been any point argued or relied on, as to what constitutes "due process of law;"
143 and the court, in its decision, does not decide, discuss, or even allude to the question as to what are the necessary elements in "due process of law," with reference to taxation, or otherwise, within the meaning of the Fourteenth Amendment to the National Constitution. That question was, evidently, not considered. We, therefore, do not regard the observations made in the course of the opinion upon statutory notice in its relation to the equalization of taxes, on the question of the validity of the statute under the State constitution, or other casual remarks upon points not argued, or well considered, as authoritative upon the point now under consideration.

This case, as well as the *San Mateo case*, has been laboriously prepared, and elaborately argued by many eminent counsel, and if the industry of the Attorney General, and a large number of attorneys and special counsel for the numerous counties interested in the question, has failed to find any recognition of the principle they were endeavoring to maintain either in the practice of the several States, in the text-books, or decisions, or even *dicta* of the courts, we think it will be safe to presume that none can be found. The statement of counsel that the court "finds no warrant whatever in the books" for the views expressed in the *San Mateo case;* that an opportunity to be heard before property can be compulsorily taken from a person in the form of a general tax upon property, is an essential element in "due process of law" seemed to us extraordinary. The statement is not based on the pretense that the language quoted from the various cases cited, is not found in the decision, but on the ground that in some of the cases the decision did not turn upon the precise point, whether such an opportunity is an essential element of "due process of law," and in the other cases, on the ground that the question arose in relation to local assessments for street improvements, and the like, and not in assessments for taxes for gen-
144 eral revenue under laws providing revenue for the ordinary general expenses of the State, county, or city.

As to the first class of cases one of the counsel of the defendant well says, and his language is adopted as a clear general statement of a principle often acted upon by the courts: "The existence of doctrines and rules of law is often shown and established by a continuous and uniform series of judicial *dicta*, incorporated into their opinions by judges *arguendo*, although, perhaps the actual facts of the cases under discussion did not absolutely require the statement of such doctrines or rules. And here you will discriminate. * * * These expressions of judicial opinion may be correct, or may not be correct. They may be expressions of well settled rules, of well set-

tled and established principles—principles, the statement of which is not absolutely necessary to the final decision—and yet a continuous and uniform series of such judicial statements is often very high, in fact the highest evidence of the existence of the rule of law which they do set out. One simple *dictum* may not be of much weight; or it might have much weight; depending largely upon the ability, the character, and authority of the judge. But a uniform *concensus* of such judicial expressions of opinion, even when they are *dicta* of different judges, in various courts, especially when they have been accepted by able text-writers, and not contradicted by a single direct decision, is as high evidence of a doctrine, or rule, as can be found."

In all the cases of this class cited by the court, even if the decision did not turn upon this point of constitutional law, the discussion was cognate to the case, and the judges, clearly and distinctly stated the right to an opportunity to be heard, as a *constitutional* right. Some of these declarations can scarcely be called *dicta*, and they relate both to general taxation and local assessments. While such assertions of the principle of law may not be of so controlling
145 a character, as a decision of a court of acknowledged authority, directly determining the point in issue, upon mature consideration, they are, certainly, of some authority, as being the deliberately expressed opinions of eminent judges, and entitled to great weight. So, also, so distinguished a jurist and text-writer as Chief Justice Cooley gives it as his deliberate opinion, and not merely as the rule drawn from the authorities cited by him, as is claimed, that notice of the proceedings and opportunities to be heard are essential. His language is: "We should say that notice of proceedings in such cases and an opportunity for a hearing of some description were matters of constitutional right. It has been customary to provide for them, as a part of what is 'due process of law' for these cases, and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended, or could be construed, to sanction legislation under which officers might secretly assess one for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment. It has often been pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard; and it has also been justly observed of taxing officers that 'it would be a dangerous precedent to hold that any absolute power resides in them to tax, as they may choose, without giving any notice to the owner. It is a power liable to great abuse,' and it might safely have been added, it is a power that under such circumstances would be certain to be abused." "The general principles of law applicable to such tribunals oppose the exercise of any such power."

In the other class of cases arising out of local assessments, the point was directly in issue, and the point in the case upon which the decision turned, and in no case was there any distinction drawn

between taxation for special local purposes, and general taxation. There can be no difference. In either case, whether general taxation, or local assessment for special purposes, the tax, or as-
146 sessment, is levied and collected under and by virtue of the sovereign power of taxation. There is no difference in the power, or principle, exercised. The only difference recognized, is, the difference in the mode of ascertaining the proper amount to be paid by each. Both are assessed, and collected, for a public purpose, as the party's share of the public burden, but the local assessment is distributed over a smaller number of persons, and a more limited territory, and is usually assessed upon that part of the property supposed to be especially benefited. It is not always, and perhaps not, usually, assessed according to the value of the property, but according to benefits, or according to the square foot, or front foot, or number of acres, or on some such principle of apportionment. It is as necessary to apportion it according to some fixed, uniform rule, requiring action of a judicial nature, as in the case of general taxation. This rule is the only distiction recognized—both systems of assessment, and collection, resting, ultimately, upon the sovereign power of taxation. Emory *vs.* The City of San Francisco, 28 Cal., 349, and People *vs.* Mayor of Brooklyn, 4 Con., 420, will illustrate the only distinctions between general taxation and local assessments, and none affect the point under discussion. In both, it is necessary to ascertain the amount, extent, and character of the property which forms the basis of the public charge, and on account of which it is to be collected, in order to, properly, apportion to each owner his proper share of the public burden. There is as great necessity for him to have an opportunity to be heard before the tax, in the case of general taxation, becomes final, as there is in the case of an assessment for local purposes, as street improvements, which is also, technically, and, legally, a tax—as much necessity for an opportunity to be heard in the one case as in the other.

The levying and collection of taxes for general purposes, under laws providing for general taxation, are just as clearly a de-
147 priving of the owner of his property, as the levy and collection of a street, or other assessment, for local purposes. It is impossible to distinguish them on this point, and no distinction is made in the books. A decision of the point, as to notice an opportunity to be heard in a case of a street assessment, is, just as clearly, an authority directly in point on the question at issue, as though made in a case of general taxation, and it would be equally controlling. The authorities arrising upon the assessment cited, therefore, are, in our judgment, authorities directly and fully in point.

Again, so far as we are advised—and such is the statement in the books, which has not been controverted—it has been the usual practice in the legislation of all the States, at some point in the proceedings, to levy and collect a tax based upon property, where it is necessary to ascertain its amount, character, and value, before the

liability becomes, finally, and irrevocably fixed, to give to the owner, or taxpayer an opportunity to be heard. Such has always been, and is now, the case under the constitution of California, except as to railroads operated in more than one county; and where there has been a departure from the rule, and the validity of such statutes litigated, on the ground of want of due process of law, as we have seen, the statutes have been overthrown. The fact of such general practice in legislation, is very persuasive evidence, that, in the estimation of the legislators and people of the several States, an opportunity to be heard in such cases, is an important element in "due process of law." This is of itself authority entitled to serious consideration. As the case stands, then, no decision of any court, no *dictum* of any respectable judge, other than so far as the cases cited may be so regarded, no passage from any text-writer has been brought to our notice which is in direct conflict with the law and principles as stated in the citations made by us on this point in the San Mateo case.

In view of the numerous *dicta*—conceding them to be
148 properly, *dicta*—of able judges in one class of cases cited; of the able decisions, directly in point, in the other class arising under local assessment laws; of the assumption of the existence of the rule by the United States Supreme Court in Davidson *vs.* New Orleans; of the adoption and laying down of the rule by text-writers of the highest eminence and judicially recognized authority; in view of the general legislation of the States upon the subject, from the beginning, recognizing, and, practically, acting upon the principle, and in view of the further fact, that no decision of a judge, or statement of the rule by text-writers to the contrary, has been brought to our notice, we think that the court was fully justified, in the San Mateo case, in expressing the belief, that the authorities established beyond all controversy, that somewhere in the proceeding of assessing a tax upon property, where it is necessary to ascertain its amount, character, and value, as a means of apportionment under a law, or State constitution—at some point before the amount of the assessment becomes finally, and, irrevocably, fixed—the statute, or State constitution, must provide for notice to be given to the owner of the property taxed, and an opportunity be afforded to make objections and be heard upon them. *If this defendant, on its large amount of property, can be lawfully taxed unheard, then it is competent for the States to abolish all right to be heard, and every person can be taxed unheard at the arbitrary will of the taxing officers.*

We have never contended that some species of taxes, as a poll-tax, license-tax upon occupations, trades, etc., where the tax is specific, and not *ad valorem*, and does not depend upon the amount of the business done, and the like, may not be levied without an opportunity to be heard. Taxes of these, and like kinds, operate upon all, alike, and a hearing would be of no possible avail. The law itself fixes the amount. It is a legislative act, wherein the objects of taxation are indicated, and amount fixed alike for

all, leaving nothing of a judicial nature to inquire into, or determine. But, where the tax is based upon the
149 amount, character, condition, and value of property, the amount of business, income, etc., and it is necessary to inquire into, examine, hear evidence, and decide upon these matters, in order to assign to each individual his proper share of the public burden, he is entitled to notice of some kind, and an opportunity to be heard, before the extent of his liability is, finally, and, irrevocably, fixed. The notice may not be required to be personal to each individual, or anything other than statutory, but the statute should fix some time within, and place, at which, he may appear, and must give to the taxpayer a right, and some opportunity to appear, and be heard upon the matter. He may not succeed in reducing his tax, but the law affording an opportunity, presumes, that justice will be done upon a proper hearing and proofs, by the officers charged with the duty of doing justice in these matters. The same observation applies to the suggestion, that a party is as much entitled to be heard upon the fixing of the rate of taxation, as to ascertaining the kind, amount, and value of the property. Fixing the rate is a matter of legislative discretion, and a legislative act. An estimate of the amount of revenue required; the probable total amount of property upon which it must be imposed, being made, the rate is fixed upon that basis, making the allowance, suggested by experience, for inability to collect the whole tax. But when fixed, it operates equally upon all. It is only when it is necessary to ascertain the kind, amount, condition, and value of each man's property for the purpose of apportioning his proper share of the burden, that it is necessary to act judicially, and to give an opportunity to be heard before the amount shall be, finally, and irrevocably, fixed.

Second. We are of the opinion, expressed in the San Mateo case, that the statement required by section 3664 of the Political Code, as adopted in 1880, does not afford notice, and an opportunity to be heard, sufficient to constitute "due process of law," within
150 the meaning of the constitutional provision, for the reasons there stated, (8 Sawy., 296.) In this case the assessment was *largely* in excess of the valuation furnished by the railroad officials, in pursuance of section 3664. As to the supposed statutes of 1881, published as a statute in the statute of 1881, (p. 84,) considered in the San Mateo case, in 8 Sawy., 292 *et seq.*, an error in the *printed* journal appears, which was not called to our attention at the hearing of that case. Upon counting the names of those appearing among the ayes in the printed journal (Jour. Ass., 24th session, page 472) there are found to be forty-one names, which constitute just a majority, although they are footed up as thirty-nine, and the announcement by the speaker was that there were thirty-nine ayes, and thirty-two noes. The speaker declaring "that this was not the final action on the bill, and that the house had concurred in senate amendments to assembly bill No. 475, by a vote of thirty-nine ayes,

to thirty-two noes." (Id., 473.) Mr. Paulk appealed from the decision of the chair, "on the gronnd that forty-one votes were required for concurrence." On motion of Mr. Hoitt, this appeal *was laid on the table.* Mr. Hale filed a protest, the ground being, "that on the vote taken on the motion to concur in the said senate amendments, and *the only action* taken by this assembly on said bill, as amended in the senate, whereby it was passed by the assembly, there was less than a majority of the members of the assembly voting therefor; and, therefore, said bill, having upon such final vote received less than a constitutional majority of the assembly, I protest, as aforesaid, that said bill should have been declared lost." (Id., 475.) The speaker then again "stated that the action on senate amendments to the bill *was not a final action on the bill*, and, consequently, concurrence, or non-concurrence in the amendments required a majority vote only." (Id., 475.) Mr. Griffith thereupon said: "The decision of the speaker and the house to the effect
151 that less than a majority of the whole can concur in an amendment which may take all the virtue out of a bill, I regard as dangerous. * * * * Wherefore, I desire to enter my solemn protest against such proceedings." (Id., 475.)

And Mr. Kellogg said: "I desire to have my protest entered upon the journal of this assembly against the decision of the speaker, in declaring that the assembly had concurred in the senate amendments to the bill," * * * * for the reason that the journal shows that forty-one members did not vote aye in concurring with said amendments." This was the last action of the house on this bill. It will be seen, then, that while, upon counting up the ayes in the *printed* journal, forty-one names are found, yet that they were footed up and carried out as thirty-nine; the vote was announced by the speaker as thirty-nine, and the whole subsequent action of the house was upon the assumption that there were but thirty-nine. Upon comparing the *printed* journal with the *original written* journal, however, on file in the office of the secretary of State, it is conceded on all sides that they do not agree in the names voting aye, the original *written* journal containing only forty names, one of the names in the *printed* journal *not appearing in the written* journal. We are of opinion that the written journal is the authentic, official record, and that it corresponds with, and is sustained by, all the other parts of the printed journal, and with the announcement of the speaker and all the action of the house, and that it must control. It therefore affirmatively appears that the act never passed, and never became a law of the State of California.

Besides, it was officially announced by the speaker at the time, and so recorded, that this *was not the final passage of the bill*, and that it was on this ground that the amendments were concurred in by a vote less than the number required by the constitution on the *final* passage of a bill. There was no appeal from this de-
152 cision, and it does not appear to have been revoked. No other vote appears to have been had, or other announcement by

the speaker made in regard to this bill. No other action was had by the house, except on March 4th, being the last act before ad journment *sine die;* the bill was reported as correctly enrolled, and as having been presented to the Governor for approval. No action was taken on this report, and the bill does not appear to have been reported to the house as having been approved. At the time of the adjournment of the Legislature, therefore, there was an appeal pending, lying on the table, liable to be called up at any time from the very decision of the chair declaring the amendments to be concurred in. Thus there had been no final action on this question, unless the report of the committee on enrollment, without further action thereon, can be so regarded, and the whole matter was still in the control of the house, and unfinished business, when the Legislature was dissolved by adjournment and lapse of time.

At the time the assessment in question was made, then, neither the constitution, nor any statute of California, gave the defendant any right, or afforded it any legal notice of the proceeding, or opportunity to be heard, as to the correctness or propriety of the assessment. The assessment was an arbitrary exercise of power by the State Board of Equalization, according to its own will and and pleasure. It is true, that in some of the cases, *though not in this case*, an agent of defendant did appear before the Board, after the assessment was made, and sought to get the assessment reduced, and the Board, after hearing the application, refused to reduce the assessment, but upon what grounds it does not appear. The defendant offered to show, by the testimony of members of the Board, upon what ground the refusal was made, but the evidence was ruled out on the objection of the plaintiff that it was incompetent. As there was no law authorizing such an application or hearing, or authorizing a modification of the assessment by the Board upon such application, and the listening to the application was a mere matter of grace, it is the legal presumption that the Board acted in conformity with the law, and put its refusal on that ground—that it would be unlawful to reduce the amount. But whether it did or not can make no difference.

153 If such a right to be heard is an essential element of "due process of law," the law must provide for it as a right. The party is not required to accept the boon by the favor or good nature of the officers. And as the proceeding would be wholly without the pale of the law, it will not be presumed that the board would act with that nice regard to judicial fairness, or that proper sense of judicial responsibility, that would characterize their proceedings when acting wholly within the limits of their official duties, as imposed upon them by the law.

Third. The next question is whether the provision of the State constitution under which the assessment in question was made is in conflict with the clause of the Fourteenth Amendment to the National Constitution, which provides that no State "shall deny to any person within its jurisdiction the equal protection of the laws."

In order that my views on this point may be presented in a connected, unbroken, order, I shall adopt the reasoning contained in the discussion of the fifth point of my opinion in the San Mateo case, with such additional observations, incorporated at the proper places, as occur to me illustrative of the views entertained. In the forcible and accurate language of Mr. Edmunds, which I cannot improve, the "Fourteenth Amendment was a new *Magna Charta*, that was in fact, in form, and in effect a fundamental security to every person in the State in respect of every private right that could be invaded, and an absolute affirmation of equality of civil rights to all persons before the law. The first clause forbids the State to touch life, liberty, or property without due process of law; and the second forbids that *even with* due process of law any person shall be denied the equal protection of the laws. This is the plain letter of the amendment. It is its intrinsic and beneficent spirit, and it was its purpose." * * *

"What, then, is equality of protection? A *civil* right *under* a government is a distinct thing from a *political* right *in* it. Thus a State may deny to females the right to vote, but it cannot
154 deny to them the right to sue in courts or impose on their property all the burdens of the community. To hold otherwise would lead to the affirmation of the right of the State to make race, or color, or religion, or age, or stature the criterion of *civil* rights, and to exert the absolute right of confiscation by classes or descriptions; for in such a case every person of that class or description would stand on an equality with his fellow-victims."

"It is not denied that a State may classify the persons who are to perform certain public duties or bear certain public burdens, based upon personal peculiarities of either sex or calling, etc., as to require military service only from males, or to exempt females from a poll-tax, and impose a license tax upon certain trades, or tax all franchises of corporations and their special privileges; but it could not impose a poll-tax on one-half its male or female citizens that it did not impose on the rest *in like degree*. And when we come to the case of property, *as property*, to be affected by a tax or any other imposition imposed upon it as a *thing* of *value*, a distinction cannot be made to depend upon character, or occupation, or quality, or any individual characteristic of the citizen. To hold otherwise would be to set up the very essence of tyranny and arbitrary power."

"'*Equal* protection' is the *same* protection under the *same* circumstances; all are to stand alike in like intrinsic conditions. Holding property *as property* is certainly a like intrinsic condition. In the administration of justice, if the criterion of a right to sue be value, all must have the same right when the same value is concerned; or if the criterion be the nature of the controversy, all must have the same right whose cases are of the same nature. This appears to be too clear for discussion."

"So, too, in the matter of taxation. If the tax, as in this case, be

laid upon the *values* of property, all persons must stand on
155 the same footing according to the value of their respective property as to the proportionate burden they are to bear in respect to the value."

"The farmer must be assessed at the same rate for the value of his land, as the lawyer, for the value of his land, and he must have the same right of notice and hearing, etc., as his fellow-citizens of other callings; and if deductions are provided to be made from values on account of debts (which is only a method of reaching effective value) of one class of citizens, they must be made from those of other classes, without reference to what particular characteristics as citizens, or persons, they may have, as sex, or race, or age, or quality, or calling."

"The *basis* of the imposition being *property, as such*, the fact that certain property is owned by a corporation, or a white man, or man of bad character, or a clergyman, cannot be made the ground of a levy, that both in form, in fact, and in result is unequal, and injurious. Any other doctrine, necessarily, implies, that the State may carry such unequal exactions to the end of complete confiscation by edict of all the property of any class, or man, who, during the passion of the hour may not be in the sunshine of popularity."

It is insisted, that the constitutional provision under which the tax in question is levied, does not deny to the defendant the equal protection of the laws, and it is sought to maintain the validity of the provision, on the ground, that it is a proper exercise of the principle of classification—that the property is clasified according to its condition, and use—and on that ground, properly, taxed upon a basis different from that applied to other property. The provision to be considered is as follows:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. *Except as to railroad and other quasi public corporations*, in case of
156 debts so secured, the value of the property affected by such mortgage, deed of trust, contract or obligation, less the value of such security, shall be assessed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situated. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of such security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such a payment a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or

debtors, and shall be computed according to the tax levy for the preceding year."

Whatever the property then, real or personal, mortgaged to secure a debt, the value of the debt so secured, in the case of everybody, "*except a railroad and other quasi public corporation*," is to be deducted from the value of the property mortgaged, and the value only of the property mortgaged, "less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof." That is to say, that the property is to be divided between the parties according to the value of their respective interests, and whatever the nature or extent of the interest of each in the property may be, it shall be taxed to the real owner. But in the case of "a railroad or other *quasi* public corporation," there is to be no reduction of the value of the mortgaged property—no division according to the interests of each—and the whole is to be taxed to one party, although he, in reality, does not *own* the whole. In one case, if property is mortgaged to the extent of half its value, the owner is taxed
157 upon one-half the value, and the owner of the debt secured or the mortgagee is taxed upon the other half. But in the other case, the owner of the legal title to the property is assessed and taxed upon the whole value of the property, and the other party, who is interested to the extent of one-half, upon none. A, a natural person, or even a corporation other than one of the excepted class, has $50,000 in cash—all the property he has—and purchases of B, another natural person, a piece of real estate for $100,000, that being its actual value, paying one-half down, and giving a mortgage for $50,000, to secure the balance of the purchase money. The constitution in effect says—and in this instance such is the real substantial state of facts—that A and B each has $50,000 in the property, one-half not having been paid for by A, and each shall be assessed and pay a tax upon his own interest in it, amounting to $50,000. A, in this instance, is worth only $50,000, and if he pays taxes upon a larger amount, he pays taxes upon property he does not really own—upon property owned by somebody else. This seems to be a self-evident proposition.

C, "a railroad, or other *quasi* public corporation," also has $50,000 cash, and purchases of B, for its proper use, an adjoining piece of real estate for $100,000, which is also its actual value, paying $50,000, and giving a mortgage to secure the balance of the purchase money. In this case, as in the other, the actual interest of each in the property is $50,000. They stand, precisely, upon the same footing in all particulars with reference to the property. C has only $50,000 in the property—it not having paid for the other half—and B the rest. But in this case the constitution says that C shall, nevertheless, be assessed for and pay taxes upon the whole property, *double* the amount he *really owns, and B shall not be required to pay anything.* That is to say, that C shall not only pay the tax on its own property, but the tax upon B's property; that money, to

the amount of the tax assessed upon $50,000 belonging to B
158 shall be taken by the State or county from C and appropriated to the use and for the benefit of B, to liquidate B's share of the public burdens. This sum, being so much more than C's share of the public burdens, and being in fact B's share, *the result of the operation is, not only to take so much property from C, for public use, without compensation, but also to, arbitrarily, take it from C and apply it to the use and benefit of another private party, B, without compensation. The result would be the same, whether the property of A, B, and C, thus situated and mortgaged, is land, a railroad operated in one or more counties, or any other kind of property.*

Does a law which authorizes such proceeding—such discriminations—bear or press equally upon A and C, or equally upon B and C? Is C equally protected in its rights of property with A, or equally protected with B, *or equally with all other natural persons;* or all corporations other than railroad, or other *quasi* public corporation? Although situated precisely alike with reference to their property, do they feel the pressure of the public burdens, equally, and alike? The question does not appear to me to admit of argument. Upon the very statement of the proposition, it seems to me to be self-evident that a law authorizing and *requiring* such proceedings, does not afford, but expressly *denies* the equal protection of the laws. The constitution in the one case says that "the mortgage, deed of trust, contract, or obligation" shall be "deemed and treated as an interest in the land affected thereby," which, in the cases supposed, together with the debt secured, it undoubtedly, in fact, is; but, in effect, the constitution says it is not so in the other case. Different kinds of property may require to be taxed in different forms and modes, in order to be equally taxed. And classifications of property, for purposes of taxation, should have reference to the just equality of burdens, so far as that is, practically, attainable. Classification should have reference to the different character, situation, and
circumstances of the property, making a different form,
159 or mode of taxation proper, if not, absolutely, necessary. It cannot be, arbitrarily, made with mere reference to the nationality, color, or character of the owners, whether natural or artificial persons, without any reference to a difference in the character, situation, or circumstances of the property. Should second mortgagees foreclose a mortgage on a railroad or other property of a "railroad or other *quasi* public corporation," and a natural person become the purchaser of the road, or other property subject to the prior mortgage, at the next annual assessment, the amount of the first mortgage bonds, or indebtedness secured, would be deducted from the value of the road or other property, and the amount of the bonds or other indebtedness assessed to the mortgagees. Such, also, would be the result in the case before supposed, if C—a railroad, or other *quasi* public corporation—should convey its land to a natural person subject to the mortgage to B; and although there would be no change in the condition, circumstances, use, or value of the

property—the change being only in the owner—C's grantee would only be required to pay one-half the amount of taxes which C had been compelled to pay, and B, who before paid nothing, would be required to pay the other half. Should the Southern Pacific railroad and its lands pass into the hands of a natural person, upon a foreclosure and sale, under a second mortgage, subject to the mortgage now on them, the value of this very security would be deducted from the value of the property at the next annual assessment. Thus, although the property would in all respects be the same, and similarly situated, and applied to the same uses—for natural persons, as well as corporations, may own and operate railroads—a mere change in the ownership would require and effect an entire change in the mode and basis of the assessment, and the amount of taxes levied on the owner. Nothing, it seems to me, could more clearly demonstrate the unsoundness of the proposition, that
160 only an admissible classification of property for the purposes of taxation, is involved in the different schemes provided for taxing the property of "railroad, and other *quasi* public corporation," and the property of natural persons, and of other corporations. Railroad and other *quasi* public corporations are not even put upon the same footing with other corporations, the latter being placed upon an equality with natural persons. A mere change of ownership under the provisions in question, largely affects the amount of taxes paid by the owner upon the same property, without any change in the character, condition, value, use, or circumstances of the property itself. A provision that a black man shall pay double the amount of taxes paid by a white man, on the same kind of property similarly situated and used, or upon the identical property, in consequence of a mere change of ownership from a white man to a black man, might with as good reason be sustained, on the principle of classification invoked. The classification in this case is clearly by ownership, and not by condition or use.

That natural persons may own and operate a railroad in this State, as well as corporations, is manifest from the fact that this road is mortagaged under the authority of the laws of the State, and this of itself, necessarily, involves the power to sell and convey, in case the occasion arises, under a decree of foreclosure, to any party who is willing to pay the highest price for the road. It also appears, as a fact, in this case, that a natural person purchased a railroad operated in more than one county, extending from Marysville, in the county of Yuba, to Oroville, in the county of Butte, under a decree foreclosing a mortgage, received his conveyance therefor, and, that he has been operating it, and been assessed, and has paid taxes upon it for more than two years past. So, also, numerous statutes of the States were introduced in evidence, granting the right to natural persons, not incorporated, to build and operate railroads. "An act to provide for the construction of a
161 railroad from Mokelumne City to Woodbridge, in the county of San Joaquin." Statutes 1862, page 97, and an act author-

izing the building of a railroad from the Embarcadero on the bay to Petaluma, in Sonoma county (id., 295), are examples of numerous acts of a similar character found scattered through the volumes of the statutes from that time to the present. Thus private parties owning and operating railroads, covered by mortgages and situated in all respects precisely as railroad corporations are situated with respect to the same kind of property, would only be required to pay taxes upon the excess of the value of the road, or other property, over the value of the security; while the holder of the security would be assessed for and pay the taxes on the value of the security. The personal liability of each would only extend to the tax on his own interest, and, in many instances, the value of the security would equal the whole value of the property, thereby relieving the mortgagor of all taxes on the property. This is not classification, therefore, by its condition or use, for the purposes of taxation at all, but by ownership.

There is no difference in the rate imposed; it is taxed according to its value, like all other property; no more, and no less tax, in the aggregate, is levied. It is, therefore, taxed upon the same principle as other property; no more and no less revenue is raised by the classification. The State is not benefited. The burden is simply taken from the owner and thrown upon one who does not own the property taxed. It is not taxed to, and made a personal charge upon, the owner, as other property is under like circumstances. This is the only difference, and that does not affect the principle of the taxation. Unless it is competent to class the property of Jones, whether land, or railroad, or other property, when mortgaged, as belonging to Smith, and compel Smith to pay the taxes as a personal charge or liability imposed upon him, on the property of Jones, who is not to be taxed or charged upon the property at all, when
162· the same thing is not done as to other property of like kind and similarly situated, then, this provision of the State constitution cannot be maintained on the principle of classification, or any other. The interests of the mortgagor and mortgagee are not the same—not identical. The estate of one begins where the estate of the other ends. They both together, under that clause which makes the mortgage in all cases—as it does in terms—an interest in the land, for the purpose of taxation, make up the whole, so far as classification for the purpose of taxation is concerned.

Suppose the position of the parties, the mortgagor and mortgagee in this case, in regard to the imposition and payment of the tax had been reversed, and the constitution had imposed the tax upon the whole, as a personal charge upon, and compelled payment by the mortgagee—the holder of the security—instead of upon the mortgagor, the mortgagor not being taxed at all, would such a provision have been valid upon the principle of classification, or any other? Would the mortgagee stand upon the same footing as other mortgagees? I apprehend that such a provision would not stand for a moment in the presence of the provision in the National Consti-

tution assuring to all the equal protection of the laws. Such a provision would not operate equally upon the two parties interested in the property, nor upon the mortgagee, thus taxed, and other parties in like circumstance, where the mortgagors are natural persons, or other corporations, who are only compelled to pay taxes upon the interests in property which they actually own. If the holder of the security could not be taxed for the interest held by the owner of the railroad, land, or other property mortgaged, no sound reason is apparent for holding that the mortgagor can be taxed for the whole, and especially where, as in this particular instance, the value of the security is greater than the value of the estate of the other party. There cannot be one law for one person, and a different and more onerous law for another, similarly situated, and
163 both enjoy the equal protection of the laws in the particulars wherein such laws differ.

Conceding the Fourteenth Amendment to apply to taxation, as it undoubtedly does, I think I hazard little in saying that no possible reasoning can justify such classification or discrimination under it, that classification upon which such principles is arbitrary, tyrannical, and unjustifiable.

There can be no valid classification of property under the *State constitution*, for purposes of taxation, based upon the uses to which it is applied, except so far as the use may give additional value to the property; and the principle under the *constitutional provision requiring all property to be taxed at its value*, would only authorize the increase, or modification of the assessment, by adding the increased value so arising from the use. One owner may pasture his land; another raise wheat, cotton, or sugar cane; another plant a vineyard for the production of wine, or an orange grove; another erect buildings upon his land and enjoy the rents arising therefrom; and another devote his to the construction and operation of a railroad. If any of these uses give additional value to the land, or other property, it must still be taxed at its actual value be it greater or less. But under the constitutional provision *requiring all property to be taxed at its actual value* it cannot be classified by its uses, *for the purpose of applying other principles of taxation than value as a basis; or for the purpose of taxing it according to ownership, so as to make one class of owners, as such, pay more than another; or one class of owners pay the taxes that ought to be assessed against and paid by another class.* The State constitution does not profess to classify upon the basis of she uses to which property is applied. It recognizes no such principle in terms or by implication. It says nothing about uses, but classifies, in terms, by ownership, and includes all of the property of the same owners in its class for non deduction of the value of the se-
164 curity—lands and other property held for sale, as well as property used for operating railroads, or other corporate uses of *quasi* public corporations—without making any reference whatever to its uses. The only rule by which any property is authorized to be assessed is according to its value. The constitution, arbi-

trarily, provides, as to a particular class, that they shall pay the taxes upon the interest—according to the constitutional definition of property—in the property held by another class of owners, who are allowed to escape taxation altogether, and in this particular the laws do not bear upon or protect the former equally with the latter. It provides that railroads and other *quasi* public corporations shall pay taxes upon property they do not own, shall pay other people's taxes. This discrimination against such corporations is not a taxation, but a confiscation of their property, *not for the benefit of the public, for there are no more taxes collected in the aggregate, but for the benefit of other property owners, who thereby escape their share of the public burdens.* If the arbitrary discrimination and classification found in this case can be legally made under the National Constitution, and the law of the land, then the subordinate State constitution, or law, can be so framed as to dispose of a man's rights in property of all kinds by arbitrary classification and definition without regard to the real facts, circumstances, or condition of the property. A person may, by such subordinate statutory provisions, be classified and defined out of the equal protection of the laws guaranteed by the National Constitution; and if so, with reference to this provision, he can also be classified and defined out of uniformity in the operation of the laws in other particulars; out of the protection of due process of law, and of the provision forbidding a law impairing the obligation of contracts, or taking property for public use without just compensation; and, indeed, out of all the guaranties of the constitution, State or National. I am not arguing that property of all kinds may not be taxed where it is found, provided all owners are put upon the same footing; but in this case there is a personal liability sought to be enforced against the defendant for taxes not imposed upon others in like circumstances, without any means provided for reimbursement, such as are applicable to others similarly situated by the party who ought to pay the tax.

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For authorities, including decisions of the United States Supreme Court, illustrating this point, reference is made to the San Mateo case, 8 Sawy., 302–4.

It is argued that the taxing of the whole value of mortgaged property of railroads and other *quasi* public corporations, to the corporation owning it subject to the mortgage, while the same thing is not done with respect to the property of natural persons, or other corporations similarly situated, is valid as being simply a *franchise* tax—a tax for the privilege of being a corporation, "a tax imposed as a return for privileges and powers not possessed by individuals." It is further said that it is not material by what standard a franchise tax is measured—whether the tax is in gross or measured by receipts, the amount of property acquired, or by any other standard; and cases are cited from some of the States where a franchise tax is claimed to have been sustained on such principals. But this view wholly ignores the provisions of the State constitution

itself on the subject. This is not, and does not purport to be, in any sense, a *franchise* tax. A *franchise* tax is otherwise, in express terms, provided for. The constitution itself prescribes how a franchise tax shall be assessed, and that is like all other property, "in proportion to its value." "All property * * * shall be taxed in *proportion to its value, to be ascertained as provided by law.*" (Art. xiii, sec. 1.) "The word property, as used in this article and section, is hereby declared to include money, credits, * * * *franchises*, and all other matters and things * * * capable of private ownership. (Ib.)

166 Again, "the *franchise*, roadway, etc., of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization *at their actual value.*" (Ib., sec. 10.) Thus the *franchises* of the defendant, under the constitution of California, can only be assessed like other property, according to "their actual value," be that more or less. Their *franchises* have, therefore, already been otherwise assessed at their value—all the constitution will allow—and this discrimination is not, and cannot be, under the constitution of California, a franchise tax. It has no reference to the franchise. It is simply in law what it is, in fact, an arbitrary and unjustifiable discrimination against railroad and other *quasi* public corporations, that cannot be maintained under the Fourteenth Amendment to the National Constitution, guaranteeing to every person the equal protection of the laws.

Great stress was laid in the arguments of plaintiffs' counsel upon the growing and overweaning power and greed of corporations; and it was, vehemently, asserted that this is a struggle between the people and the corporations for supremacy; that corporations, by corrupt means, and through their large and widespread influence, have obtained, and they are obtaining, control of legislatures, etc., etc.

If this be so, then it is of the utmost importance to every natural person in the United States that these guaranties of the Fourteenth Amendment to the National Constitution should be maintained in all their length and breadth. They are the only means of protection left to the people. If these unequal taxes can be imposed upon the class of corporations named in the constitution the position of the parties can be reversed, and the unequal tax now thrown upon the corporations may, hereafter, be imposed upon the other parties. If these can be taxed without a hearing, then all, or any class of persons can be taxed without a hearing; and if there is good ground for

167 *the alarm manifested by the counsel of the plaintiff, such corporations, when they acquire the deprecated power and control indicated, will not be likely to be slow in shifting the unequal burden to the other side. There is, therefore, upon that hypothesis, no safety to the people, except in most rigidly maintaining the guaranties of the Fourteenth Amendment in their broadest scope.*

Fourth. Upon the point as to whether the provision of the State constitution under which the tax in question was levied is valid by virtue of the power of the State over corporations under the author-

ity reserved to the State under the constitution to amend, alter, or repeal the laws under which they were organized, or otherwise, I refer to the quite full discussion of the point under the sixth head in my opinion in the San Mateo case, 8 Sawy., 304. I shall, however, make some additional observations.

In order to sustain the validity of the tax on that ground, the constitutional provision must operate as an amendment to the *general* statute of California, by which it imposes upon railroad and other *quasi* public corporations under the amended statute, as a condition of their continued existence, a liability to be taxed, otherwise than as natural persons and other corporations are taxed. It is not pretended by anybody, that any express intention to amend the act relating to corporations, is found in the new constitution; or that any reference is anywhere made to the act. The operation of the amendment of the statute is sought to be worked out by implications, and the necessities of the case which require the tax to be sustained on that ground, as there is no other on which it can rest. But repeals, or amendments of statutes by implication, never were favored; and under our constitution, limiting the power of the Legislature to the passage of acts embracing but a single subject, which must be expressed in the title of the act, and forbidding an amendment, otherwise than by re-enacting the whole section as amended, would seem to render the rule still more restrictive in its operation. No reference to this matter of taxation is made
168 in any part of the chapter devoted to corporations. The provision is found in the chapter providing for taxation, and which deals with taxation, and, *only taxation, as taxation.* It is manifest, that the idea of amending the act relating to corporations, was never contemplated by the convention in framing, or the people in adopting, the constitution. We are satified, that the charge must be sustained, if sustained at all, only, as a tax, without reference to the power of the State to impose further conditions upon corporations not imposed at their creation, by amendment to the general laws under which they became incorporated.

But if the State, under its power to amend the laws under which corporations are formed, is entitled to impose this charge, not imposed upon natural persons, and other corporations, under like circumstances, as a condition of its continued future existence, the corporation is not bound to accept the condition, and go on. No charter can be forced upon an association of natural persons, and no new, or more onerous conditions can be forced upon a corporation, already, formed. It may elect to dissolve and retire from the field of enterprise occupied, rather than accept the new conditions; and such conditions might be imposed as would compel that course. *But, until accepted, they from no part of the charter, and impose no new valid obligations.* An acceptance of the new conditions cannot be presumed while the corporation is protesting, that none have been imposed; or, if attempted to be imposed, is insisting, that they are invalid—void and of no effect—and in every way, and by all means

in its power, is resisting the attempt of the State to give effect to this assumed change in its rights and obligations—while it is still denying the power of the State to make the change. Till the corporation elects to accept the new conditions imposed, or gives some evidence of such election, rather than dissolve, there is no implied promise or obligation to assume the additional burdens laid upon it, or, as in this instance, to pay the additional tax thus im-
169 posed *in invitum*, upon which an action can be maintained.

This corporation, like every other person, against whom a right is claimed, certainly, is entitled to litigate the question, whether any new valid obligations, or conditions, have been imposed upon it, before it can be called upon to determine whether it will dissolve and retire, or accept the conditions and proceed. *A refusal to accept surely can give no right of action, which depends upon acceptance.* If there is any remedy in behalf of the State, against a corporation declining to accept, but still continuing to exercise its functions in violation of the existing law, it it by some proceeding in the courts, in the nature of an information, to dissolve the corporation and wind up its affairs; and this, it appears to me, is the remedy in this case, if there is an amendment to the act under which the defendant is incorporated, imposing the liability of this unequal and unjust tax upon it, as a condition of its continued existence, and the corporation refuses to accept it, or to submit to it.

The doctrine asserted and sought to be maintained, that because a corporation owes its origin and existence to the State—is a creature of the State—it and all its belongings are under the arbitrary power and control, and at the absolute mercy, of the State, is monstrous. The State, through general laws applicable to all similar corporations, may abolish corporations, may take away their faculties, may enlarge or restrict their powers and functions for the future; but it cannot lay its hand upon their lawful acquisitions or property otherwise than as upon the acquisitions and property of natural persons. Although the title and management of these are vested in the ideal being called a corporation the ultimate property is in the corporators, and their rights in the property and acquisitions are as sacred in their corporate as in any other of their relations to society, or to the State.

Had the State constitution provided, that the property of
170 corporations might be taken for public use without any compensation, and without a trial or hearing of any kind, such as for the sites of public buildings, public streets, or squares, or for the use of railways, and the corporations had denied and resisted the validity of such provision, I apprehend that no court would hold, that because it did not immediately dissolve and retire from business upon the adoption of such a provision, that it had been accepted and, thenceforth, become one of the conditions of the future continued existence of the corporation, and in consequence of the fact that its property might, thenceforth, be arbitrarily taken and appropriated to public use without any hearing or compensation.

Yet, such a provision would be no more monstrous than the doctrine sought to be maintained. Indeed, it is the necessary logical sequence of the doctrine.

From these considerations, and those expressed upon this point in the San Mateo case, and from the expressed terms of the constitution itself, it is clear to me that the provision in question attempts to provide only for exercising the sovereign power of taxation—has no other end to accomplish, and accomplishes, no other purpose, and that the rights of the parties must be determined on that hypothesis alone—that is to say, the hypothesis that it is a tax merely, without any reference to a change of the fundamental conditions upon which the corporation is to continue in existence. If not, then, that the new conditions have not been accepted, and there is no ground upon which this action can be maintained. The suit is simply one at law for a tax, and nothing else, and the plaintiff must recover on that theory and on the case made, or not at all. If this tax can be imposed upon the defendant simply because it is a corporation, when it could not be imposed upon natural persons holding, owning, and using its property under like conditions in all other respects, then it would be difficult to point out what rights are left to corporations, or natural persons in their corporate re-
171 lations, which the State, under the Fourteenth Amendment, or otherwise, is bound to respect.

Fifth. At the time of the assessment and levy of the tax in question there was a deed of trust in existence, and operative, to secure a large indebtedness, executed by defendant to D. O. Mills and Lloyd Tevis, before the adoption of the present constitution of the State of California, which covered the Southern Pacific Railroad, its track, depots, rolling-stock, and all appurtenances—the road aggregating 1,150 miles in length, of which over 700 are completed and in operation. It also covered all the lands granted by the United States to aid in the construction of said railroad, aggregating, as estimated, 10,000,000 acres after excluding reserved lands embraced in the statutory description. This deed of trust or mortgage was duly recorded in the several counties of the State through which the road extended and in which the lands were situated.

A portion of the road, and of the lands mortgaged, was situated in the county of Santa Clara. The mortgage was for $46,000 per mile, of which amount bonds have been issued to the amount of $89,000 per mile. The lands mortgaged, so far as they had been patented, including the lands in Santa Clara county, have been taxed to defendant, in the several counties in which they were situated, at their full value, and without any reduction on account of the mortgage, and the taxes duly paid. So, also, no reduction in the amount of the assessed value of the road, rolling-stock, etc., was made in consequence. Thus, all the property embraced in the mortgage was taxed to the defendant at its full value, without any reduction in the amount on account of the mortgage. The trust deed contained the following covenant: "And the said party of the

first part hereby agrees and covenants, to and with the said parties of the second part, and their successors in trust, that it will pay all ordinary and extraordinary taxes, assessments, and other public burdens and charges which may be imposed upon the
172 property herein described, and hereby mortgaged, and every part thereof; and the said parties of the second part, the survivor of them or their successors in said trust, or any one or more of the holders of said bonds, may, in case of default of the said party of the first part in this behalf, pay and discharge the same, and any other lien or incumbrance upon said property, which may in any way, either in law or equity, be or become in effect a charge or lien thereon prior to these presents, or to which this mortgage may be subject or subordinate, and for all payments thus made the parties so making the same shall be allowed interest thereon at the rate of seven per centum per annum, and such payments, with the interest thereon, shall be, and are hereby, secured to them by these presents, and declared to be payable and collectible in the same sort of currency or money wherein they shall have been paid, and the same shall be payable by said party of the first part to said parties of the second part, upon demand, in trust for the party or parties paying the same, and may be paid out of the proceeds of the sale of said property and franchises hereinbefore provided."

It is gravely and earnestly insisted here, that under this covenant the defendant had bound itself to the trustees to pay the whole taxes assessed upon the property covered by the mortgage; that if the tax should be assessed upon defendant, and there should be a recovery in this case and payment of the judgment, the defendant would pay no more than it is bound to pay under the covenant in the trust deed, and could not be injured; therefore, the tax is valid, and a recovery should be had in this action, even though the tax, as levied against the defendant, is unauthorized by any valid law, or was levied without the authority of any law. It would seem to be only necessary to state the proposition to make manifest its fallacy. The proposition, in substance, is, that if a valid tax had been levied the defendant had bound itself by a contract to
173 protect a third party, with whom the plaintiff is not in privity against it, by payment, or allowing such third party to pay it, and make it a secured charge against defendant. And since this is so, although it is not authorized by any valid law, it would not injure the defendant to levy the tax against it, and compel it to pay the whole amount of tax that ought to have been properly levied on somebody on account of the property; therefore, the plaintiff ought to recover, although there is no valid tax levied against him, or anybody else—no tax for which anybody is now legally liable. Somebody ought to have been made personally liable to pay this tax by a proper and legal assessment of it; and if anybody had been made liable, defendant would have been bound to pay it under its covenant, but there was no valid assessment, either against the de-

fendant or anybody else, yet the defendant is personally liable, and plaintiff ought to recover. Such is the reasoning presented to us.

This tax as levied, is either valid, as properly levied under the law, or it is void, and its validity must depend upon the law. It cannot depend upon the fact, that private parties, by an anterior contract, with which the State and county are not in privity, had a stipulation as to which should pay any tax properly levied. If valid, as against defendant, so as to make it, personally, responsible, then the plaintiff is entitled to recover, whether it would be injured or not, and there is no need to invoke the principle, that defendant cannot be injured by doing what it is insisted it in good morals ought to do. If the tax, as levied, is not valid, and a legal personal charge upon the defendant, under the law, without regard to any contract between private parties as to who shall pay a valid tax upon the land, when levied, then there is no valid tax, or personal charge, against anybody, for no tax purports to have been levied against the trustees in the trust deed, or against the holders of the security. There is no tax upon which the covenant can
174 operate. This action is not based upon moral equities, or even upon equities recognized and enforced by courts of equity. It is a dry action, at law, to recover what is alleged to be a sum of money *legally* due, and for which the defendant is *legally*, personally, liable by reason of a valid levy of a tax against it. That is the cause of action alleged, and upon that a recovery must be had, if at all, and according to the *allegata* of the complaint. This is not a suit in equity to enforce a lien for a tax. It is not an application for an injunction against the collection of the tax, in which, possibly, the court might consider whether there were any equities which should call upon it to deny the injunction, or relief, affirmatively, sought. It is not a case for the exercise of discretion. It is an action resting upon a strictly legal personal liability. It is not enough, that a valid tax to some extent might have been levied. There must be such a tax, as throws a legal liability upon the defendant to pay to the plaintiff the sum claimed, or there can be no recovery. But had there been a valid tax levied against the covenantee, or mortgagee, on account of the property, this would not have authorized a recovery against defendant *by reason of the covenant* alone. The covenant cannot affect the case. The covenant was between the defendant and the trustees, for the benefit of the latter, or rather the bondholders secured, and not for the benefit of the plaintiff. The plaintiff is not in privity with them. But suppose the covenant had been between defendant upon a due consideration, and the trustees, expressly made for the benefit of the plaintiff, in such form, if such could be, as to give plaintiff a right of action on the covenant. It would be necessary to set out the contract on which the right of action rested, and make it the basis or ground of action. Nothing of the kind has been done. The theory of this action is, that a valid tax has been legally assessed against defendant, for which it is, personally, liable under the con-

175 stitution, and a recovery is sought on that ground in the complaint, and upon no other; and it can be had upon no other.

There were two kinds of covenants in use in mortgages and trust-deeds at the time the trust-deed in question was executed; one a covenant that the mortgagor would pay all taxes that might be assessed on the mortgaged property, and in default of payment, that the mortgagee might pay it himself for the protection of his security, and upon such payment that the taxes so paid should be added to the debt, and draw like interest. This was simply to protect his security against other parties who might subsequently acquire liens, and to convert his advances into principal and fix the rate of interest. The purpose of this covenant was not to render the mortgagor liable to pay a tax which he was not already liable to pay, but it was to enable the mortgagee to pay it for its own protection, in case the mortgagor did not, and take away the *voluntary* character of the payment, so that he could convert it into a secured debt, drawing interest as a part of the principal. The other was that the mortgagor would pay not only all taxes levied on the mortgaged property, but also all taxes that should be levied upon the moneys loaned and secured. This was an indirect way of increasing the interest paid on the loan, and imposed an additional burden upon the mortgagor. This last covenant is now forbidden and rendered void under the new constitution.

The covenant in the mortgage in this case is clearly of the first kind. It only required the mortgagor to pay the taxes or liens *which it was at that time bound to pay without the covenant, and in no way extended its liability.* A law, or constitutional provision, which should compel him to pay the taxes assessed upon the property of the mortgagee would enlarge his liability beyond that covered by his covenant, and be void. This covenant only extended to taxes for which the defendant was already liable. Besides, if no valid tax has been levied, then the case is not within the covenant,
176 for the defendant cannot be called upon under the covenant to pay a tax absolutely void.

Again, suppose the covenant had been in a mortgage or trust-deed between two natural persons, made at the same time, the sum secured being the whole value of the property. Under the constitutional provision in question, the value of the security, which in the case supposed is the whole value of the property, must be assessed to the *holder of the security*, and made a personal charge on him alone. It could not be assessed to the *mortgagor*, and made a personal charge or liability on him, and enforced by a suit for a personal judgment; because there is no statute, or constitutional provision, purporting to authorize such a proceeding. Yet he has covenanted with the holder of the security in the same sense as in the trust-deed in question, to pay the whole tax levied on the land, and he would not be injured according to the theory of the plaintiff, if the whole tax should be assessed and recovered against him.

If such assessment should be made against the mortgagor instead of the mortgagee without any law for it, or even purporting to authorize it, and a suit be brought to recover a personal judgment for the amount, I apprehend that no counsel would be found bold enough to urge that the utter invalidity of the tax is no defense against the suit, for the reason, that if a proper tax had been levied against the proper party, he would be bound by his covenant with *that party* for the protection of that party's interest, alone, to pay the tax, and, therefore, he is not injured. If such an action under such circumstances could not be maintained against the mortgagor, then it cannot be maintained against the mortgagor in this case, otherwise there is one law for this defendant, and another law for natural persons, occupying in all respects with reference to their property precisely the same situation; and there is a manifest denial of the equal protection of the laws in this particular as well as in the others. They are not equal before the laws.

177 If the constitutional provision in question is void, then there is no law under which this tax could be levied against defendant, and it is utterly void and cannot form the basis for a recovery. In my judgment the provisions of the State constitution upon which the validity of this tax and the right to recover alone, rest, violate the provisions of the Fourteenth Amendment in question, in four vital particulars.

1. They assess railroad and other *quasi* public corporations upon a different basis from that adopted with respect to natural persons, and other corporations similarly situated with respect to their property in the particulars in these opinions and in the opinions in the San Mateo case pointed out.

2. They provide, with respect to all property other than railroads operated in more than one county, an opportunity to be heard in the course of the proceeding to assess their property before the assessment becomes irrevocably fixed, while they afford no such notice or opportunity to be heard with reference to railroads operated in more than county, and in both these particulars deny to the defendant the equal protection of the laws within the meaning of the Fourteenth Amendment to the National Constitution.

3. In not affording notice and an opportunity to be heard before the tax becomes finally and irrevocably fixed, they deprive the defendant of its property without due process of law.

4. In assessing a tax and enforcing it as a personal liability against defendant upon property which it does not own, but which is owned by other parties, who pay no tax upon it, the defendant's property, to the extent of the amount taken beyond his proper share of the public burden, is taken for public use both without due process of law and without compensation.

178 As there must be judgment for defendant upon the points arising under the National Constitution, it is unnecessary for us to extend these opinions by examining the questions arising alone under the State laws and constitution over which we would

have had no jurisdiction but for the fact that the questions already discussed are in the case. Those are questions more properly belonging to the State courts. We have found the facts in the case, however; and if it should turn out that we are in error upon the points decided, the Supreme Court will be called upon to decide those questions also. If we are not in error, then those questions will doubtless be left to the State courts, where they properly belong.

For the reasons herein, and in the opinion of the presiding justice stated, in addition to those given in the several opinions delivered in the San Mateo case, I think judgment should be rendered for defendant, as directed.

September 17, 1883.

Endorsed: Read in open court, September 17, 1883. L. S. B. Sawyer, clerk.

Bond on Writ of Error.

179 In the Supreme Court of the United States.

THE COUNTY OF SANTA CLARA, Plaintiff in Error,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, a corporation, Defendant in Error.

Know all men by these presents, that we, Edward E. Potter and Charles L. Taylor, are held and firmly bound unto the Southern Pacific Railroad Company, a corporation, defendant in error herein, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said, the Southern Pacific Railroad Company, its successors or assigns. To the payment of which, well and truly to be made, we bind ourselves, and each of
180 us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals. Dated the 20th day of October, A. D. 1883.

Whereas the above named county of Santa Clara, in the State of California, United States of America, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States, for the district of California, in the cause entitled, County of Santa Clara, plaintiff, *versus* The Southern Pacific Railroad Company, a corporation, defendant, (No. 3074.)

Now, therefore, the condition of this obligation is such that if the above named county of Santa Clara, plaintiff in error, shall prosecute its said writ of error to effect and answer all costs, if it shall fail to make good its plea, then this obligation shall be void,
181 otherwise to remain in full force and virtue.

ED. E. POTTER,
C. L. TAYLOR.

Signed, sealed, and delivered in presence of—
ALFRED BARNSTOW.

UNITED STATES OF AMERICA, } ss:
District of California, }

Edward E. Potter and Charles L. Taylor, being duly sworn, each for himself deposes and says, that he is a householder in said district, and is worth the sum of five hundred dollars in lawful money of the United States of America, exclusive of property, exempt from execution, and over and above all debts and liabilities.

ED. E. POTTER. [SEAL.]
C. L. TAYLOR. [SEAL.]

Subscribed and sworn to before me, this 20th day of October, A. D. 1883.

[SEAL] OTIS V. SAWYER,
Notary Public.

182 Endorsed: The form of the within bond and the sufficiency of the sureties thereon are hereby approved.

(Signed) LORENZO SAWYER,
U. S. Circuit Judge.

Filed 20th Octo., 1883.

L. S. B. SAWYER, *Clerk.*

183 I, L. S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing one hundred and eighty-two written and printed pages, numbered from 1 to 182, inclusive, are a full, true, and correct copy of the record, and of all proceedings in the therein-entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and seal of said circuit court, this 24th day of October, A. D. 1883.

[SEAL.] L. S. B. SAWYER, *Clerk.*

184 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The County of Santa Clara, plaintiff in error, and The Southern Pacific Railroad Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf you are commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you

have the same at the city of Washington, in the District of Columbia, on the twenty-second day of October, A. D. 1883, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, chief justice of the Supreme Court of the United States, this 20th day of October, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

[SEAL.] L. S. B. SAWYER, *Clerk.*

The above writ of error is hereby allowed.

LORENZO SAWYER,
U. S. Circuit Judge.

185 *The Answer of the Judges of the Circuit Court of the United States for the District of California.*

The record and all proceedings of the plaint, whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Endorsed: No. 3074. United States Supreme Court. The County of Santa Clara, pl'ff in error, *vs.* The Southern Pacific Railroad Company, def't in error. Writ of error.

186 UNITED STATES OF AMERICA, *ss:*

To the Southern Pacific Railroad Company, a corporation, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the city of Washington, District of Columbia, on the twenty-second day of October, A. D. 1883, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, wherein the County of Santa Clara is plaintiff in error, and yon are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 20th day

of October, A. D. 1883, and of the Independence of the United States the 108th.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge.

187 Endorsed: 3074. United States Supreme Court. County of Santa Clara, pl'ff in error, *vs.* The Southern Pacific Railroad Company, def't in error. Citation. Service of a copy of the within citation is hereby acknowledged. Oct. 22, 1883. L. D. McKisick, att'y for def't in error.

Endorsed on cover: California C. C. U. S. No. 1200. The County of Santa Clara, plaintiff in error, *vs.* The Southern Pacific Railroad Company. Filed 5th November, 1883.